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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EUGENE EWAN MORI, PETITIONER

vs.

MELVIN GITTLEMAN and THE BANK OF N.J.,
AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE
OF EUGENE MORI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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67 pp

QUESTIONS PRESENTED

1. Where an attorney performs services for a decedent's Estate and that attorney also, pursuant to an entirely independent and distinct contractual arrangement performs other services for an individual who happens to be a beneficiary of the decedent's Estate, and where that attorney is involved in forgery of checks drawn to the individual client and felonious misappropriation of that individual client's funds, which forgery and felonious misrepresentation were never disclosed to the Probate Court and was never discovered by the individual client until much later, and where the attorney himself has to this day never denied his involvement in the forgery and felonious misappropriation of his client's funds, does an Order of the Probate Court which solely approves the fees charged by the attorney for services performed for the Estate and which Order does not pass upon the legitimacy of the fees charged by the attorney to the individual, the attorney never even

haying applied to the Probate Court for approval of his fees charged to the individual client, thereafter bar the individual client from an action against the attorney for forgery and fraudulent misrepresentation of that client's funds and for a determination as to the legitimacy of the fees that the attorney attempted to charge to the client?

2. Can a matter as serious as felonious misrepresentation of a client's funds through forgery and other illegal means simply be cast aside by the granting of a Summary Judgment ruling where the cleint was never given an opportunity to fully present his case, complete discovery, or take the Deposition of the attorney charged, and where the Court accepted verbatim and without taking testimony the lengthy and false Brief and Affidavit of the attorney charged, and where the court chose to totally ignore the serious charges and well-documented case presented by plaintiff, especially considering the fact that the attorney has never denied the wrongful misappropriation of his client's

funds?

3. Where an attorney and client have a personal contract for the performance of legal services, totally distinct and independent from services which the attorney has performed for the decedent's Estate, the client also happening to be a beneficiary of the decedent's Estate, is an Estate proceeding the proper forum where the client must be reasonably expected to raise issues concerning the attorney's felonious misrepresentation of the client's personal funds and forgery of checks drawn to the client and the issue of the legitimacy of the fees charged to him by that attorney for the personal services, especially considering that the attorney never even applied to the Probate Court for approval for fees for services he rendered to his individual client and the felonious misappropriation and forgery were never disclosed to the court and were not discovered until much later?

4. Can the doctrines of res judicata and/or collateral estoppel be held to apply

to a situation where an application for court approval of fees attempted to be charged by an attorney against an individual client has never been filed and where notice has never been given to the client that court approval would be sought by the attorney for allowance of such fees, and where court approval was never in fact granted and the fees of the attorney attempted to be charged against the client were therefore never passed upon or approved by that court?

5. Do the doctrines of res judicata and collateral estoppel apply to a dispute as to the propriety of fees charged by an attorney to his client and the issue of that attorney's wrongful misappropriation of his client's funds, when there was no prior opportunity for the client to object to the fees charged to him by that attorney since that attorney never made any application in any other Court to approve or permit fees which he alleged to have charged his client?

6. Should an attorney be permitted to

benefit from his own wrongdoing by hiding behind the doctrines of res judicata and collateral estoppel and thereby avoiding having to answer for his alleged forgery of a client's name to checks drawn to the client and misappropriation of that client's funds?

7. As a matter of public policy, should an attorney be permitted to avoid having to answer to charges of forgery of a client's checks and misappropriation of a client's funds by asserting the doctrines of res judicata and collateral estoppel, when the client never had an opportunity to previously raise those charges?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Third Circuit are listed in the caption. The Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, is not involved in this matter any longer, the only relevant respondent being Gittleman.

EDITOR'S NOTE

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2 The Courts Below have Misunderstood the Purpose and Impact of N.J.S.A. 3B:17-8. By its Clear Terms the Statute Exonerates and Discharges the Fiduciary from all Claims of all Interested Parties. It does not Exonerate and Discharge Someone Like Gittleman who was Never a Fiduciary in this Matter, and the Statute was Never Intended to Protect a Wrongdoer such as him 41

3 Attorney Melvin Gittleman has been Rewarded by the Lower Courts for his Wrongdoing. Although he has Obviously been a Party to Criminal Wrongdoing and Serious Ethical Misconduct, the Lower Courts have not Even Made any Reference to Such Violations and Have Totally Glossed Over his Reprehensible Actions. As a Matter of Public Policy, an Attorney and Officer of the Court Should not be Permitted to Avoid Answering Charges of Forgery of a Client's Checks and Misappropriation of a Client's Funds by Asserting the Doctrines of Res Judicata and Collateral Estoppel, When the Client Never had an Opportunity to Previously Raise Those Charges Against the Attorney 45

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

Eugene Ewan Mori, appearing as Attorney Pro Se, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported. The Opinion is contained in the Appendix, infra, p. 44a.

The Report and Recommendation of Magistrate Haneke, adopted in its entirety by Judge Fisher, granting Summary Judgment in favor of Gittleman is not reported. The Report and Recommendation of Magistrate Haneke is contained in the Appendix, infra p. 14a.

The Opinion of Judge Fisher granting Summary Judgment in the District Court in favor of The Bank of New Jersey is not reported. The Opinion of Judge Fisher is contained in the Appendix, infra, 1a.

JURISDICTION

The judgment of the Court of Appeals (App. infra 44a was entered on January 29, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The only pertinent statutory provision in any way involved in this case is N.J.S.A. 3B:17-8 which reads:

> A judgment allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of other matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those in privity with or represented by interested parties except:
>
> a) for the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;
>
> b) insofar as exceptions to the account shall be taken and sustained; and
>
> c) as relief may be had from a judgment in any civil action.

It should be noted that the impact of this Statute has been incorrectly interpreted by the Courts below. The Statute clearly states

that a judgment allowing an account shall be res judicata as to all exceptions which could or might have been taken to the account and shall exonerate and discharge the fiduciary from all claims of all interested parties.

The Courts below have interpreted this Statute to protect Gittleman. Gittleman, however, was never a fiduciary with respect to this case. The fiduciary was The Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased. Judge Fisher granted Summary Judgment in favor of The Bank of New Jersey based upon this Statute.

Judge Fisher and the Court of Appeals, however, erroneously misinterpreted this Statute and erroneously held that the protection of this Statute is afforded to Gittleman. This could not possibly be correct as Gittleman was never an individual who was intended to be protected by this Statute. The only ones to be exonerated or discharged are fiduciaries, and Gittleman does not fall into that class.

STATEMENT OF THE CASE

(1) FACTUAL BACKGROUND

Plaintiff Eugene E. Mori hired Melvin Gittleman, Esquire, in June, 1974 to file real estate tax appeals for the year 1974 for properties located in North Bergen, New Jersey, and owned jointly by plaintiff and his father, Eugene Mori. Plaintiff owned a 25% interest in these properties and his father owned a 75% interest.

At the time of Gittleman's hiring, plaintiff's father was in a coma, having suffered a severe stroke. Eugene Mori died on October 8, 1975, and The Bank of New Jersey was appointed Administrator Pendente Lite of the Estate of Eugene Mori.

The Retainer Agreement executed between plaintiff and Gittleman hired Gittleman solely for the purpose of prosecuting tax appeals, for properties owned by plaintiff and his father, for the year 1974 only. Thereafter, plaintiff had no other deals with Gittleman for prosecuting tax appeals for other years for properties

owned by plaintiff.

Nevertheless, The Bank of New Jersey decided to retain Gittleman to file tax appeals for subsequent years for properties owned by the Estate. Obviously, plaintiff was not a party to such negotiations between Gittleman and The Bank of New Jersey, and just as obviously The Bank of New Jersey had no authorization to make any agreement with Gittleman which would be binding upon plaintiff.

Subsequent to the death of plaintiff's father, a Partition Action was instituted in the New Jersey Superior Court, Hudson County. A Consent Judgment was entered on November 18, 1977, partitioning the property that had been jointly owned by plaintiff and his father. Seventy-five percent of the property was allocated to the Estate and 25% was allocated to plaintiff.

(2) FORGERY AND MISAPPROPRIATION OF FUNDS BY GITTLEMAN

Gittleman successfully prosecuted the tax appeals for 1974 for which plaintiff had hired him. As a result, plaintiff became entitled to personally receive the sum of $121,609.05 in tax refunds from the Township of North Bergen, based upon his 25% ownership interest in the pertinent property. The fee agreement that had been entered into between plaintiff and Gittleman entitled Gittleman to receive 1/6 of the tax saving as his fee, therefore, Gittleman's fee for services performed for plaintiff should have amounted to $20,268.18.

Gittleman claimed, however, that he was entitled to a fee from plaintiff in the sum of $33,055.53. Although plaintiff had never hired Gittleman for any other purpose but the 1974 tax appeals, Gittleman attempted to charge plaintiff a substantial additional fee for services Gittleman performed relative to the years 1979 and 1980 at the behest of the Estate,

claiming plaintiff received some benefit therefrom, despite the fact that plaintiff had never reached any fee agreement with Gittleman on these issues nor did he ever authorize Gittleman to do any such work for him, nor did he ever approve Gittleman doing such work for him.

Gittleman apparently let greed get the better of him, and he decided to utilize self-help techniques to assure that he would receive payment for the fee he claimed due to him from plaintiff. It was at this point in time that Gittleman engaged in obvious illegal conduct.

As previously set forth, plaintiff was entitled to tax refunds from North Bergen in the sum of $121,609.05, and North Bergen thereafter issued various drafts made payable to plaintiff for sums totalling such amount. In an apparent conspiracy with North Bergen, defendant somehow obtained from North Bergen several checks drawn from North Bergen to plaintiff, totalling $31,968.83, such checks representing partial payment of the tax refunds due to plaintiff.

It is clear that the aforesaid drafts were issued to plaintiff as payee. Plaintiff, however, never saw nor received these drafts. Instead, Gittleman, by his own admission, "retained tax refund checks from the Township in the amount of $31,968.83", leaving it to one's imagination as to how Gittleman could possibly have obtained from North Bergen checks which were drawn to Eugene E. Mori.

Mr. Mori never authorized anyone to endorse his signature on these checks, and quite obviously his signature was forged either by Gittleman or by someone else at Gittleman's direction.

The exact manner in which Gittleman obtained the misappropriated checks from North Bergen has never been determined, plaintiff having been denied the opportunity to depose Gittleman at the Trial level. Despite having filed voluminous documents on his own behalf in the District Court, Gittleman has never stated nor set forth how he obtained or negotiated the checks in question.

(3) GITTLEMAN'S FEE APPLICATIONS IN THE PROBATE COURT

The Estate of Eugene Mori was probated in the New Jersey Superior Court, Chancery Division, Burlington County, before Honorable Alexander C. Wood, III. Gittleman had been independently hired by The Bank of New Jersey to prosecute various tax appeals for the Estate. As a result of favorable prosecution of such appeals on behalf of the Estate, the Estate was entitled to refunds from North Bergen in the sum of $364,825.53 for the years 1974 through 1978. Gittleman had entered into an agreement with The Bank of New Jersey entitling him to a fee of 1/6 of the tax savings for those years plus expenses. Such fees and expenses had to be approved by Judge Wood.

The Bank of New Jersey, as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, submitted before Judge Wood an application for a Third Accounting, and in such application Gittleman requested payment for the sums due

to him for services performed for the Estate. Significantly, Gittleman made no application whatsoever to the Probate Court for approval for any fees charged by him to plaintiff, Eugene E. Mori.

It was indicated to the Court that the Estate would be responsible for 75% of the fees and costs submitted by Gittleman, the Estate being the owner of an undivided 75% interest in the property. It was made clear that any claim of Mr. Gittleman against Eugene E. Mori would have to be pursued independently, and that the Estate would not be responsible for same. The Judgment on the Third Intermediate Account approved payment to Mr. Gittleman of 75% of the fees and costs requested.

The Judgment on the Third Intermediate Account did not, however, approve any fees allegedly due to Gittleman from plaintiff. The issue of plaintiff's responsibility for services performed on his behalf by Gittleman was never before the Probate Court. It was a simple matter of a contractual arrangement between Gittleman and plaintiff which had nothing to do with the Estate

proceeding. It is quite clear that Gittleman never applied to the Probate Court for it's approval of fees charged by him to Mori, and it is equally clear that Judge Wood never considered nor passed upon this issue.

As there was never any application in the Probate Court for approval of fees charged by Gittleman to plaintiff, plaintiff never had an opportunity to object to, contest, or otherwise be heard on the propriety of the fees Gittleman was attempting to charge him until plaintiff filed his action against Gittleman in the United States District Court for the District of New Jersey.

None of the vast multitude of documents filed in the Probate action ever indicated that Gittleman had obtained tax refund checks that had been drawn payable from the Township of North Bergen to Eugene E. Mori. Nor was there any indication that those checks had somehow been negotiated by Gittleman. The issue of whether Gittleman wrongfully forged and misappropriated checks that belonged to plaintiff was never considered, raised,

or litigated before Judge Wood. This was properly so, as Gittleman had never filed any application before Judge Wood for fees against plaintiff, and the relationship between plaintiff and Gittleman was something entirely foreign to the Estate matter.

(4) PROCEEDINGS IN THE COURTS BELOW

Plaintiff instituted the within action in the United States District Court for the District of New Jersey against both defendant Gittleman and The Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased. The primary defendant was always Gittleman, and the Administrator was initially included in the suit on the basis of information and belief that there may have been improper collusion between Gittleman and the Administrator which resulted in Gittleman having wrongfully obtained and wrongfully misappropriated the checks drawn to plaintiff's order.

The Administrator, in October, 1982, moved to dismiss the Complaint pursuant to F.R.C.P. 12(b), and the Motion was argued before the Honorable Clarkson S. Fisher. Judge Fisher dismiss the Complaint against The Bank of New Jersey on the basis of res judicata.

Judge Fisher's decision was based upon the application of N.J.S.A. 3B:17-8 which provided, in pertinent part, that a Judgment allowing an

account "shall exonerate and discharge the fiduciary from all claims of all interested parties...". As plaintiff had been a beneficiary of his father's Estate, the fact that he did not object to the Administrator's actions in the Probate Court was held to prohibit him from further proceedings against the Administrator.

Subsequently, Gittleman filed a Motion for Summary Judgment, claiming that the doctrines of res judicata and collateral estoppel should bar any claims of plaintiff against Gittleman. Oral argument was heard before Magistrate Haneke on January 9, 1984, and on June 27, 1984, Magistrate Haneke issued his Report and Recommendation.

Plaintiff prepared and submitted detailed written objections to the Report and Recommendation, however, it is clear that the District Court never referred to such objections, as the date of mailing of plaintiff's objections, July 10, 1984, was the same date that Judge Fisher adopted the Magistrate's Report and granted Summary Judgment in Gittleman's favor.(*)

Although oral argument before Magistrate Haneke took place on January 9, 1984, Magistrate Haneke's Report and Recommendation was not issued until June 27, 1984. Plaintiff had represented himself pro se at oral argument, having discharged his attorney only several days earlier. Plaintiff had only received the voluminous amount of paperwork and documents in his file from his prior attorney several hours before the oral argument. Plaintiff appeared before Magistrate Haneke and virtually begged and pleaded with him to grant plaintiff a brief postponement so that he could either obtain another attorney or himself have sufficient time to prepare for oral argument. Magistrate Haneke denied the request and plaintiff was forced to proceed pro se without having had sufficient opportunity for the detailed prepar-

(*) Plaintiff had obtained an extension of time for filing his written objections to the Report and Recommendation of Magistrate Haneke, and under the circumstances Judge Fisher's decision was rendered prematurely, Judge Fisher obviously not having taken the opportunity to review a 21 page single spaced typewritten letter by plaintiff objecting to various aspects of Magistrate Haneke's Report and Recommendation.

ation that was obviously necessary to properly argue the case.

After the oral argument took place, there was no further visible action concerning the case until June, 1984. Finally, plaintiff became puzzled by the delay of many months without receipt of a decision and wrote a letter to Magistrate Haneke dated June 20, 1984, inquiring as to whether the Magistrate had finished his opinion. The response was Magistrate Haneke's Report and Recommendation dated June 27, 1984.

It appears that Magistrate Haneke really spent very little time considering plaintiff's arguments in writing his Report and Recommendation, as it was 95% quoted directly and verbatim from the Brief that had been submitted on behalf of Gittleman. It certainly appeared to plaintiff that Magistrate Haneke had merely placed the matter aside, and after having received plaintiff's letter, the Magistrate quickly put together the Report and Recommendation by copying word for word from the Gittleman Brief. Magistrate Haneke totally avoided making any reference whatsoever

in his Report and Recommendation to the many arguments that had been raised on behalf of the plaintiff and further made no reference to the obviously improper conduct of Gittleman. Just as obviously, Judge Fisher merely rubber-stamped Judge Haneke's Report and Recommendation.

It is clear that Magistrate Haneke and Judge Fisher accepted verbatim the Brief submitted by Gittleman, despite the fact that the Brief contained many false and inaccurate statements. Plaintiff had been denied the opportunity to take Gittleman's Deposition, and the decision made by Judge Fisher was made without any testimony having been taken whatsoever. Magistrate Haneke and Judge Fisher further totally ignored the arguments that had been submitted by plaintiff, despite the fact that plaintiff's charges of Gittleman's forgery and felonious misappropriation of funds was well documented.

The issue of fees charged by Gittleman to the plaintiff was never properly before the Probate Court, nor were such issues ever adjudicated

by the Probate Court. Nevertheless, Magistrate Haneke and Judge Fisher apparently felt that plaintiff felt that plaintiff somehow should have objected to a non-existent fee application and granted Summary Judgment in favor of defendant based upon the doctrines of res judicata and collateral estoppel.

Plaintiff appealed to the United States Circuit Court of Appeals for the Third Circuit, and in an extremely brief Opinion, the Court affirmed, on the basis of res judicata and collateral estoppel. The Circuit Court of Appeals made no reference whatsoever to Gittleman's wrongdoing or to the many other arguments that had been raised by plaintiff. The Court's Memorandum Opinion was filed and Judgment was entered on January 29, 1985.

The basis for federal jurisdiction in this case is diversity of citizenship, plaintiff being a citizen of the State of Florida, and defendant being a citizen of the State of New Jersey.

REASONS FOR GRANTING THE PETITION

(1). THE LOWER COURTS HAVE TOTALLY MISINTERPRETED, MISCONSTRUED AND MISAPPLIED THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL TO THE PERTINENT FACTS IN ISSUE, CONTRARY TO EXISTING CASE LAW.

This case presents extremely important quesions concerning the applications of the doctrines of res judicata and collateral estoppel. A review of the facts and the appropriate law clearly indicate that the lower courts have totally misconstrued the applications of these doctrines. The lower courts have improperly extended these doctrines to a situation where there was neither an identity of issues in the two cases nor an actual litigation of the issues to which the estoppel was held to apply.

Further, plaintiff totally lacked a full and fair opportunity to litigate the issue of the defendant's forgery and wrongful misappropriation of funds as well as the issue of the propriety of the defendant's fees charged to

him, as those issues were never raised before the Probate Court, nor could they have been properly raised in the Probate Court.

Gittleman's felonious misappropriation of funds and involvement in forgery were obviously never disclosed by him to the Probate Court, and plaintiff was never aware of Gittleman's criminal misconduct until it came somewhat to light in the Bankruptcy Court through the testimony of Vincent Gentile. It was at that time that plaintiff learned that checks issued by the Township of North Bergen and drawn payable to him had been negotiated by Gittleman without plaintiff ever having seen or endorsed those checks. Plaintiff attempted to raise these issues before Judge Lipkin in the Bankruptcy Court, however, Judge Lipkin instructed plaintiff that such issues would have to be determined in another forum. Therefore, plaintiff instituted the within proceeding, this case having been plaintiff's first opportunity to raise and litigate issues pertinent to Gittleman's criminal misconduct and the propriety of the fees Gittleman

was attempting to charge plaintiff.

At least four elements must be satisfied before an Order in a former action can be given collateral estoppel effect in a later proceeding:

> (1) the issue sought to be precluded must be the same as that involved in the prior action;
>
> (2) the issue must have been actually litigated;
>
> (3) it must have been determined by a valid and final judgment; and
>
> (4) the determination must have been essential to the prior judgment.
>
> Haize v. Hanover Ins. Co., 536 F.2d 576, 579 (3d Cir. 1976).
>
> Feniello vs. University of Pennsylvania Hospital, 558 F.Supp. 1365 (U.S.D.C., 1983).

At least three of the four elements set forth above were lacking in this case, when one analyzes what actually occurred in the proceedings in the Probate Court:

(1) The issues in the two cases involved were not identical;

(2) The issues of Gittleman's forgery and wrongful misappropriation of funds as well as the issue of the propriety of Gittleman's

fees charged to plaintiff were neither raised nor litigated in the Probate action; nor was there any disclosure by Gittleman to the Probate Court that a forgery and misappropriation of funds had been committed;

(3) Neither the issues of Gittleman's forgery and wrongful misappropriation of funds nor the issue of the propriety of Gittleman's fees as charged to plaintiff was essential to the Judgment of the Probate Court approving Gittleman's fees for services performed for the Estate.

The statements of Justice Arlin Adams in Donegal Steel Foundry Co. v. Accurate Products Co., 516 F 2d. 583 (3d. Circ., 1975) at p. 588 are clearly applicable to this case:

> "...If a court of competent jurisdiction decides a matter distinctly put in issue, relitigation of the same question in a subsequent proceeding may be barred by the rule of collateral estoppel. The conclusive effect of a prior adjudication constitutes an estoppel only with respect to issues actually litigated and necessary to support the initial judgment. Litigation of any matter that was 'collaterally in question', 'incidentally cognizable', or 'to be inferred by argument from the judgment' is not

restricted in a subsequent suit.

> Without identity of issues, the party asserting the collateral estoppel may not prevail. For an issue to have been conclusively determined, it must have been raised in the prior action. In the case at hand the requisite identity of the issue is missing. ...
>
> Since Accurate's pleas of res judicata and collateral estoppel are of doubtful merit under either federal or New Jersey law we find no bar to the adjudication of the issue in the district court."(*)

Gittleman's pleas of res judicata and collateral estoppel are of no merit whatsoever. They are merely attempts at legal maneuvering and machination by a desperate attorney trying anything to avoid having to answer for his criminal and unethical misconduct.

(*) Footnotes deleted.

(A). IDENTITY OF ISSUES.

Central to the concept of the application of the doctrines of res judicata and collateral estoppel is the necessity that the issues presented in each case are identical.

> "Whatever ease or difficulty there may be in distinguishing an issue, the identity of the issue must be the same in order to justify the application of the doctrine of res judicata. It is necessary 'that the right to relief in the one suit shall rest upon the same point or question which, in essence and substance, was litigated and determined in the first suit * * *." In re Walsh's Estate, 80 N.J. Eq. 565, 569. "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand, or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action."

Miller v. Stieglitz, 113 N.J.L. 40, 44.

Godomsky v. Freeman, 120 N.J.L. Page 116 (1938).

Collateral estoppel means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot

again be litigated between the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d. 469, 475 (1970)." State vs. Redinger, 64 N.J., Page 41, (1973).

> "It is academic that the facts and issues must be the same in a subsequent case if the complainants are to be estopped on the theory of res adjudicata.
>
> 2 Freeman on Judgments 1322, states the doctrine as follows:
>
> 'Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit. Where a right, question or fact is distinctly put in issue and directly determined by a court of competent jurisdiction in a former suit between the same parties or their privies, the former adjudication of that fact, right or question is binding on the parties or their privies in a subsequent suit, irrespective of whether the causes of action are the same.'"

Walker v. Pennsylvania-Reading S.S. Lines, 142 N.J. Eq., Page 588 (1948).

The basic issues involved in the within matter are two-fold:

(1). Were the fees charged by Gittleman to plaintiff proper in light of the Retainer Agreement executed between plaintiff and Gittleman?

(2). Did Gittleman wrongfully misappropriate funds belonging to plaintiff and is Gittleman guilty of forgery or other criminal misconduct?

The aforesaid issues are totally distinct from the issues raised and litigated in the Probate Court. The sole pertinent issue before Judge Wood was whether or not he should approve the fees that Gittleman had applied for with respect to services rendered solely to the Estate. Gittleman never applied for Court consideration or approval of fees for services he had allegedly rendered to plaintiff. The very moving papers filed by Gittleman merely request an allowance for fees for services performed for the Estate. The Probate Court had no jurisdiction to determine a personal fee dispute between

plaintiff and Gittleman. Obviously realizing this, Gittleman never made any application to the Probate Court to determine any issues relative to the personal contractual relationship between Gittleman and plaintiff.

The issues of Gittleman's felonious misappropriation of funds and forgery were never properly before the Probate Court, nor could such issues have been raised, given the facts that the forgery and felonious misappropriation only came to light many months later, evidence of same being discovered while plaintiff was in the midst of his Bankruptcy proceeding.

(B). THE ISSUE MUST HAVE BEEN ACTUALLY LITIGATED.

"Res judicata as a principle of law bars a party from relitigating a second time what was previously fairly litigated and determined finally." City of Hackensack vs. Winner, 162 N.J. Super. 1 at 27. (App. Div., 1978).

As stated by the Supreme Court of New Jersey in Mazzilli v. Accident, &c., Casualty Ins. Co., etc., 26 N.J. 307 (1958) at Page 314:

> "...where the second action is upon a different claim or demand, but between the same parties, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, - not what might have been thus litigated and determined, - for it is only upon such matters as were actually litigated and determined that the judgment is conclusive." (Emphasis added)

In Allesandra v. Gross, 187 N.J. Super 96 (App. Div. 1982), the Court stated at pp.

105-106:

> "The second aspect of the requirement that the judgment be on the merits is that the factual issue must actually have been litigated and determined. Robinson-Shore Develop. Co. v. Gallagher, 26 N.J. 59,68 (1958). This requirement is explained fully in comments d and e to § 27 of the Restatement, Judgments 2d, as follows:
>
> d. When an issue is actually litigated. When an issue is properly raised by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. ...
>
> e. Issues not actually litigated. A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action."

It is extremely significant to note that there has never really been any previous litigation between plaintiff and Gittleman. The prior litigation in the Probate Court involved the Estate of Eugene Mori, deceased, and Gittleman's involvement in that proceeding was merely by means of an application filed by him for the Probate Court to allow him a fee for services he had rendered to the Estate.

Gittleman's involvement in forgery and

felonious misappropriation of his client's funds were never disclosed to the Probate Court and there was never any opportunity to have had those issues raised before the Probate Court. Further, the issue of the propriety of the fees that Gittleman claimed against plaintiff was never properly before the Probate Court, Gittleman never having made any application for approval of same, and therefore such issue was also never actually litigated in the Probate Court.

Plaintiff never learned of Gittleman's forgery and felonious misappropriation of funds until such issues were eventually disclosed in the Bankruptcy proceeding, and when plaintiff attempted to pursue these issues in the Bankruptcy Court, he was told that these issues would have to be raised in another forum. Therefore, plaintiff instituted the within action against Gittleman, and this action represented plaintiff's first opportunity to properly raise or litigate these critical issues.

"The prior Judgment can only raise an estoppel

against the plaintiff in the present action as to those questions, issues or facts which were actually litigated and determined in the prior action." Mazzilli v. Accident &c., Casualty Ins. Co., etc., supra, at p.307.

The lower courts have thus definitely committed substantial error by barring plaintiff's action on the bases of res judicata and collateral estoppel.

(C) QUESTIONS CONCERNING GITTLEMAN'S FORGERY AND FELONIOUS MISAPPROPRIATION OF HIS CLIENT'S FUNDS, AS WELL AS ISSUES RELATIVE TO THE PROPRIETY OF THE FEES HE ATTEMPTED TO CHARGE PLAINTIFF WERE MATTERS WHICH WERE COLLATERAL TO THE ISSUES BEFORE THE PROBATE COURT AND A DETERMINATION OF THOSE ISSUES WAS NOT ESSENTIAL TO THE JUDGMENT OF THE PROBATE COURT.

Yet another required element for the application of the doctrine of collateral estoppel is lacking in the present case. An Order in a former action can be given collateral estoppel effect in a later proceeding only if the determination must have been essential to the prior Judgment. Feniello vs. University of Pennsylvania Hosp., supra.

As stated by the Supreme Court of New Jersey in Mazzilli vs. Accident, &c., Casualty Ins. Co., etc., supra, at pp. 315-316:

> "...the doctrine of collateral estoppel does not extend to every fact which may have been litigated in the prior action. The doctrine is restricted to matters or facts directly in issue and does not extend to 'any matter which came collaterally in question * * * nor * * * any matter incidentally cogni-

zable, nor * * * any matter to be inferred by argument from the judgment.' Mullaney v. Mullaney, 65 N.J. Eq. 384, 388 (E. & A. 1903); Freeman, Judgments (5th ed. 1925), § 691. Thus a distinction must be drawn between those matters or facts which were directly in issue and those described as merely collateral or incidental. Freeman suggests the following basis for the distinction between the two:

'The doctrine of estoppel is restricted to facts directly in issue and therefore does not ordinarily extend to facts which may be in controversy, but which rest in evidence and are merely collateral even though they may have been passed upon.' 'A fact or matter in issue is that upon which plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish the matters or facts in issue.'

During the trial of a cause, evidence may properly be received of the existence or nonexistence of facts which, though they bear upon an issue and tend to show on which side of it the truth is, are not, though conceded to exist, necessarily conclusive. It is this class of facts which the courts have usually intended to designate by the terms 'collateral', 'incidental', or 'not directly in issue', and therefore as not being proved or disproved by the judgment, though controverted at the trial, and perhaps passed upon by the court or jury and exercising a controlling effect over the verdict and judgment." [Id., § 690, at p. 1457]

Issues relative to the forgery by Gittleman of plaintiff's signature to checks drawn to plaintiff as payee, Gittleman's felonious misappropriation of funds, and the propriety of the fees Gittleman charged to plaintiff were totally unrelated to the issue before the Probate Court.

The sole issue before the Probate Court was whether or not it should approve Gittleman's fee for services he had rendered to the Estate. The wrongdoing of Gittleman vis a vis plaintiff was an issue totally distinct from the services which Gittleman had performed for the Estate.

D) PLAINTIFF NEVER HAD AN OPPORTUNITY TO BE HEARD IN THE PROBATE COURT EITHER ON THE QUESTIONS OF FORGERY AND CRIMINAL CONDUCT OF GITTLEMAN OR ON THE ISSUE OF THE PROPRIETY OF GITTLEMAN'S FEES CHARGED TO PLAINTIFF.

Plaintiff never had a full and fair opportunity to litigate the question of the propriety of Gittleman's fees or the issues of Gittleman's forgery and criminal misconduct in the Probate Court. The Probate Court obviously was not a proper forum for these questions to be adjudicated, as the sole pertinent issue involving Gittleman was the propriety of the fees he was attempting to charge to the Estate for services he had rendered to the Estate.

As Gittleman never made any application whatsoever concerning services performed for plaintiff and never disclosed his wrongful misconduct in the Probate proceedings, plaintiff lacked any full and fair opportunity to litigate those issues in the Probate Court.

"The party precluded from relitigating the

issue must have had ... a full and fair opportunity to litigate the issue in the first action." Eatough vs. Board of Medical Examiners, 191 N.J. Super 166, at p.175 (App. Div., 1983). See also N.J. Manufacturers Insurance Co. vs. Brower, 161 N.J. Super 293, at 298-299 (App. Div., 1978), Allesandra vs. Gross, 187 N.J. Super 96, at 104-105 (App. Div., 1982), Restatement, Judgments 2d., Sect. 29 (1980).

It is quite apparent that plaintiff never had a full and fair opportunity to litigate, nor did he have a right entitling him to be heard in the Probate Court on these crucial issues. The within action was the first opportunity that plaintiff had been afforded to litigate against Gittleman. The erroneous decisions of the lower courts have prevented plaintiff from having his day in court and have permitted Gittleman to profit from, avoid having to account for, and be rewarded for his own wrongdoing.

(E) PLAINTIFF WAS NOT A PARTY IN THE PROBATE ACTION WITH RESPECT TO HIS PERSONAL RELATIONSHIP WITH GITTLEMAN.

The lower courts have totally failed to grasp the distinction between plaintiff acting in his capacity as a beneficiary of his father's Estate as opposed to plaintiff's capacity as a client of an attorney who has perpetrated a wrongdoing upon his client.

Judge Fisher granted summary judgment on behalf of The Bank of New Jersey on the basis of plaintiff's failure to object in the Probate Court to the Intermediate Accountings filed by The Bank of New Jersey. Pursuant to N.J.S.A. 3B:17-8, plaintiff was held to be a party with respect to The Bank of New Jersey acting as fiduciary, as plaintiff was a beneficiary of his father's Estate.

On the other hand, plaintiff was never a party in the Probate Court with respect to his relationship with Mr. Gittleman. Plaintiff's contractual relationship with Gittleman had nothing whatsoever to do with the fact that he was also

a beneficiary of his father's Estate. The Probate Court was certainly not the proper forum for a fee dispute between plaintiff and Gittleman. Nor was the Probate Court a proper forum for a hearing on criminal charges against Gittleman for actions he had taken involving plaintiff's personal funds.

"Central to the application of the doctrine is that the party against whom the doctrine is to be invoked must have been a party to or privy to the prior proceedings." Wunschel vs. City of Jersey City, 96 N.J. 651, 658 (1984). While plaintiff was a party vis a vis The Bank of New Jersey as fiduciary of his father's Estate, he certainly was not a party in the Estate proceeding vis a vis his private contractual relationship with Gittleman. The lower Courts totally failed to grasp this most significant distinction with respect to the two different capacities in which plaintiff was involved, and as a result, a substantial miscarriage of justice has resulted, enabling Gittleman to violate criminal laws and Canons of Ethics

without having to answer to an appropriate Court for his misconduct and wrongdoing.

(2). THE COURTS BELOW HAVE MISUNDERSTOOD THE PURPOSE AND IMPACT OF N.J.S.A. 3B:17-8. BY ITS CLEAR TERMS THE STATUTE EXONERATES AND DISCHARGES THE FIDUCIARY FROM ALL CLAIMS OF ALL INTERESTED PARTIES. IT DOES NOT EXONERATE AND DISCHARGE SOMEONE LIKE GITTLEMAN WHO WAS NEVER A FIDUCIARY IN THIS MATTER, AND THE STATUTE WAS NEVER INTENDED TO PROTECT A WRONGDOER SUCH AS HIM.

The courts below strongly relied upon the impact of N.J.S.A. 3B:17-8 in reaching the conclusion that Summary Judgment should be granted in favor of Gittleman. In so doing, however, the courts have totally misinterpreted and misapplied the clear language of the statute.

N.J.S.A. 3B:17-8 reads:

> A judgment allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of other matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those

in privity with or represented by interested parties except:

a) for the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;

b) insofar as exceptions to the account shall be taken and sustained; and

c) as relief may be had from a judgment in any civil action.

(Emphasis added)

The statute was intended only to exonerate and discharge a fiduciary from any claims of interested parties who did not take any exceptions to an account. Plaintiff took no exceptions to the account submitted by the Bank of New Jersey, and Judge Fisher was correct in interpreting this statute to bar plaintiff from any claims against the Bank of New Jersey which may have resulted from their involvement in Gittleman's wrongdoing. This was a proper result under the statute and plaintiff did not appeal this ruling.

To extend the statute to protect a wrongdoer such as Gittleman, however, is totally improper. He has never been a fiduciary in any aspect

of this matter. The statute was never intended to protect a wrongdoer such as Gittleman.

Plaintiff could not possibly have filed anything in the Probate Court to take exception to the wrongful forgery and misappropriation of funds by Gittleman. Those matters had never been disclosed at that time, and the Probate Court was obviously not a proper forum for such matters to be heard.

By the same token, Gittleman never made any application in the Probate Court for an allowance of fees against plaintiff. Therefore, there was no application to which plaintiff could have filed any exception.

The lower courts have committed obvious error in interpreting the aforesaid statute to shelter and protect the forgery and felonious misappropriation engaged in by Gittleman.

It is certainly anomalous that the lower courts would almost go out of their way to extend protection to a wrongdoer such as Gittleman while penalizing plaintiff, a totally innocent victim of Gittleman's forgery and felonious misappropriation of funds. Clearly, justice

cries out for a remedy.

(3). ATTORNEY MELVIN GITTLEMAN HAS BEEN REWARDED BY THE LOWER COURTS FOR HIS WRONGDOING. ALTHOUGH HE HAS OBVIOUSLY BEEN A PARTY TO CRIMINAL WRONGDOING AND SERIOUS ETHICAL MISCONDUCT, THE LOWER COURTS HAVE NOT EVEN MADE ANY REFERENCE TO SUCH VIOLATIONS AND HAVE TOTALLY GLOSSED OVER HIS REPREHENSIBLE ACTIONS. AS A MATTER OF PUBLIC POLICY, AN ATTORNEY AND OFFICER OF THE COURT SHOULD NOT BE PERMITTED TO AVOID ANSWERING CHARGES OF FORGERY OF A CLIENT'S CHECKS AND MISAPPROPRIATION OF A CLIENT'S FUNDS BY ASSERTING THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL, WHEN THE CLIENT NEVER HAD AN OPPORTUNITY TO PREVIOUSLY RAISE THOSE CHARGES AGAINST THE ATTORNEY.

The evidence clearly indicates that the defendant, Melvin Gittleman, Esq., engaged in illegal activity by obtaining and negotiating checks that were drawn by the Township of North Bergen to the order of the plaintiff, Eugene E. Mori. Acting as an attorney, the actions of Melvin Gittleman were highly improper and unethical, and violated the disciplinary rules and the Canons of Ethics. In effect, defendant Gittleman has profited by his

own wrongdoings. It is extremely unfair to permit defendant Gittleman to engage in illegal and unethical conduct without having to answer for same in a Court of Law.

It is clear that plaintiff was entitled to receive tax refunds from the Township of North Bergen totaling $121,609.05. It is further clear that the Township of North Bergen issued checks payable to plaintiff Eugene E. Mori for the refunds to which he was entitled.

By some illegal or deceptive technique, the details of which are still unknown, defendant Melvin Gittleman misappropriated checks which were issued to plaintiff in the sum of $31,968.83. Those checks were obviously negotiated by defendant Gittleman, and the only way such checks could have been negotiated would have been by forging plaintiff's signature as an endorsement on those checks.

Gittleman admits that he retained three checks issued by the Township of North Bergen, but explains nothing as to further details. In his Affidavit dated June 15, 1983, submitted

in support of his Motion for Summary Judgment, in paragraph 24, Gittleman states,

> "During April of 1979, the NORTH BERGEN BOARD OF COMMISSIONERS passed Resolutions authorizing payment of refunds based upon the 1978 settlement and upon receipt of those refunds, I forwarded them to the ADMINISTRATOR PENDENTE LITE in accordance with my instructions to that effect from the Administrator, with the exception of three checks totaling Thirty-One Thousand Nine Hundred Sixty-Eight Dollars and Eighty-Three Cents ($31,968.83)..."

Mr. Gittleman was able to avoid the taking of his Deposition at the Trial Court level, and plaintiff was thereby denied the opportunity to directly confront Gittleman and force him to answer some very serious questions concerning the improper activities in which he engaged. Plaintiff never authorized anyone to endorse his signature on the checks, and quite obviously his signature was forged either by Gittleman or by someone else at Gittleman's direction. Gittleman may very well have been working in conjunction with officials from the Township of North Bergen in an elaborate scheme to take wrongful advantage of plaintiff.

Perhaps even more shocking is the way Mr. Gittleman has presented his conduct to the Trial Court. He was never at all apologetic for his wrongful actions nor did he ever seem to regret them. On the contrary, he had the sheer audacity to create the erroneous impression that what he did was completely legal, proper, and beyond reproach, as if this was something done by every attorney every day.

Obviously, the actions of defendant Gittleman were governed by his greed as opposed to rational and legal behavior. If Gittleman were so interested in having his fee protected, it would appear that the most proper approach, as opposed to forgery, would have been to have the drafts issued both in his name and in the name of plaintiff, and to have deposited those checks into his trust account, pending a determination of the fair fees to which he was entitled. Gittleman's wrongful actions have prevented any court, at least up to this point, from ever having made a determination as to the fees to which he should be entitled for the

services rendered to plaintiff. Certainly, Judge Wood never made this determination.

It is respectfully submitted that defendant Gittleman has breached his professional duties as a lawyer by attempting to avoid a trial on the merits through technical and procedural manipulation. An examination of the Rules governing professional responsibility will easily bear this out.

Rule 6 titled "Judicial Ethics and Professional Responsibility" of the United States District Court for the District of New Jersey, states that the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association as amended by the Supreme Court of New Jersey and the Code of Judicial conduct of the American Bar Association shall govern the conduct of the judges and the members of the Bar admitted to practice in this Court.

The following Rules are applicable in this situation:

> (1) D.R. 1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(2) D.R. 1-102(A)(5) states that a lawyer shall not engage in conduct that is prejudicial to the administration of justice;

(3) D.R. 1-103(A) states that "a lawyer possessing knowledge of a violation of D.R. 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.".

Gittleman clearly engaged in fraud, deceit and misrepresentation when he wrongfully misappropriated the checks that rightfully belonged to plaintiff. Justice calls for an accounting to be made of defendant's actions. Mr. Gittleman has certainly engaged in conduct that is prejudicial to the administration of justice by attempting to escape litigation pertinent to this fraud through technical maneuvering and machination. Therefore, defendant has violated not only D.R. 1-102(A)(4), but also D.R. 102(A)(5). Further, by failing to thoroughly account for his wrongdoing through litigation, defendant has violated D.R. 1-103(A).

The relationship between an attorney and his client is a highly sensitive one, imposing strict obligations upon the attorney. The standards

to which an attorney is held are significantly higher than those to which the average citizen is held. An attorney is held to a much higher standard of accountability and, as a matter of public policy, should not be permitted to maneuver through legal technicalities to avoid a hearing on the merits with respect to the fairness of his fees, alleged forgery, and the propriety of conduct in which he engaged during the existence of the attorney-client relationship.

One would think that if Mr. Gittleman were totally innocent of all the charges that have been made against him, he would have welcomed a full hearing that would clear his record. It indeed seems strange that he would have gone to such great pains to circumvent a hearing unless he were a culpable party.

Copies of the three checks taken by Mr. Gittleman were annexed as Exhibits to his Motion for Summary Judgment. Each of the three checks are drawn to the order of Eugene E. Mori as payee. Plaintiff never saw those checks prior

to their having been submitted with the brief, and plaintiff never endorsed his signature on any of those checks. We are therefore clearly dealing with a case of forgery.

It is respectfully submitted that it was improper to grant Summary Judgment to defendant Gittleman on the basis of his illegal and unethical conduct. It seems strange indeed that the lower courts made no mention or comment whatsoever about this very wrongful conduct in which Mr. Gittleman engaged. Apparently, the lower courts approved of such deceptive and illegal techniques. Hopefully, this court will not stamp it's imprimatur upon the very questionable conduct of Mr. Gittleman.

CONCLUSION

The calendars of trial courts become more and more crowded daily and there is increasing pressure placed upon trial judges to move and dispose of cases. The pressures of court calendars, however, should not subvert the reason we have a court system - - to dispense fair and impartial justice and to give each litigant a full and fair opportunity to have his case heard by an impartial trier of fact.

Unfortunately, it appears that the objective of the lower courts was something other than the fair and impartial administration of justice. As a result of technical maneuvering and machination, an obvious culpable wrongdoer has been rewarded for and permitted to profit by his wrongdoing. On the other hand, a totally innocent victim of such unjust injustice has been denied the opportunity to have his day in court.

If anything, this state of affairs certainly seems to be a sad commentary on the state of

the system of administration of justice in this country today.

The lower courts took the easy way out. It is respectfully hoped that the United States Supreme Court will recognize the gross miscarriage of justice that has occurred and will grant plaintiff's Petition for Certiorari.

Respectfully submitted,

EUGENE EWAN MORI

Dated: April 26, 1985

84-1697

No. _____

Office - Supreme Court U.S.
FILED
APR 29 1985
ALEXANDER L. STEVAS.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EUGENE EWAN MORI, PETITIONER

vs.

MELVIN GITTLEMAN and THE BANK OF N.J.,
AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE
OF EUGENE MORI

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

EUGENE E. MORI
Spring Lake Club Apts.
5400 N.W. 159th Street
Miami, Florida 33014

Petitioner, appearing as Attorney Pro Se

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Attorney in Lower Court for Defendant Gittleman

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EDITOR'S NOTE

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 82-2447

EUGENE EWAN MORI,

Plaintiff,

v.

THE BANK OF NEW JERSEY, etc., et al.,

Defendants.

O P I N I O N

Seymour Wasserstrum, Esq.
102 North Sixth Street
Vineland, New Jersey 08360
Attorney for Plaintiff

Morton R. Branzburg, Esq.
Fellheimer, Eichen & Goodman
216 Haddon Avenue
Westmont, New Jersey 08108
Attorneys for Bank of New Jersey

F I S H E R, Chief Judge.

This motion is brought by defendant, the Bank of New Jersey as Administrator Pendent Lite of the Estate of Eugene Mori, Deceased to dismiss plaintiff's complaint against it for failure to state a claim upon which relief can be granted.

Plaintiff, son of decedent Eugene Mori, owned a 25% undivided interest in certain real property in North

EXHIBIT A

Bergen, New Jersey and decedent's estate owned the remaining 75% undivided interest. Commencing in 1976, defendant paid certain sums, including real estate taxes for the subject property, to the township of North Bergen, which taxes plaintiff was responsible for but refused to pay. This was done to protect the estate's undivided interest in the property.

In 1977, defendant instituted suit in New Jersey Superior Court seeking partition of the property and recovery of the sums owed to the estate by plaintiff. On November 18, 1977, the court issued a Consent Order partitioning the property. Subsequently on February 8, 1979, another Consent Order was issued entering judgment against plaintiff in favor of defendant in the amount of $1,480,000 together with interest of 8% a year. This amount included the sums owned by plaintiff to defendant for paument of plaintiff's share of the real estate taxes. When plaintiff failed to pay the amount of the judgment, a writ of execution was issued directing the Sheriff of Hudson County to levy upon plaintiff's portion of the property. On April 19, 1979, several hours before a scheduled public sale was to

take place, plaintiff filed a voluntary petition under Chapter XII of the Bankruptcy Act, 11 U.S.C. Section 801 et seq. in the United States District Court for the District of New Jersey (hereinafter "Bankruptcy Court") and obtained an automatic stay from the court, thereby staying the Sheriff's sale.

Between April 17, 1979 and May 21, 1979, defendant received tax refund checks from the Township of North Bergen for real estate taxes it had paid on the property for the years 1974 through 1978.1/ Plaintiff's complaint alleges that these checks were payable to him. Copies of resolutions of the Township of North Bergen indicate that refunds of tax overpayments were due for the years 1974 through 1978 on various parcels of land owned by Eugene Ewan Mori, Eugene Ewan Mori c/o Bank of New Jersey Admin. and Eugene Ewan Mori. The complaint further alleges that plaintiff never recieved or endorsed these checks and that defendant recieved and wrongfully misappropriated them without plaintiff's consent, knowledge, or authorization.2/

The total amount of the tax refund was $480,135,71. Defendant retained this amount, listing in the estate's

accounts as an account payable to plaintiff a sum representing plaintiff's 25% minus an amount claimed by Melvin Gittleman, Esq.3/ for legal services rendered to plaintiff for the appeal.4/

Plaintiff was informed of the retention of these funds in a letter from defendant dated June 5, 1979. He never advised defendant either orally or in writing of any objection to this action.

In April, 1979, defendant filed an action in the Superior Court of New Jersey, Law Division, Probate Part, Burlington County (hereinafter "Probate Court"), which had jurisdiction over the administration of the estate, for the settlement of the Third & Intermediate Accounting of the estate. Defendant's affidavit of services filed in connection with this action, described its payment of the real estate taxes owned by plaintiff and its receipt of the tax refund due to the successful appeal.5/ Plaintiff was served with all papers filed by defendant in connection with these proceedings, including the affidavit of services, but never served or filed any written exceptions to the accounting. On June 27, 1979, the Probate Court judge signed a judgement

allowing the account.

The subject of defendant's receipt of the tax refund was again raised in the Bankruptcy Court between September 17, 1980 and November 10, 1980 during hearings regarding confirmation of plans of arrangement under Chapter XII of the Bankruptcy Act. On November 10, 1980, the Bankruptcy Court ordered that defendant set off and pay over to itself, in reduction of its claim against plaintiff, certain sums, including the amount that it had retained as plaintiff's share of the tax refund.

In April, 1981, defendant filed an action in Probate Court for the settlement of the Fourth & Intermediate Accounting of the estate. Defendant's retention of plaintiff's share of the tax refund, the establishment of the amount as an account payable to plaintiff, and the set off of the amount against the debt owed by plaintiff pursuant to the Order of the Bankruptcy Court were set forth in the Fourth Account and in the affidavit of services filed in connection with it. Once more, plaintiff failed to serve or file any written exceptions to this account, although he had

been served with all the necessary papers. A final judgement allowing the Fourth Account was signed by the Probate Court judge on August 25, 1981.

Subsequently, plaintiff filed a compaint in this Court, based upon diversity jurisdiction.6/ Count One of the complaint alleges that defendant, without the consent, knowledge or authorization of plaintiff, wrongfully misappropriated drafts it received which were payable to plaintiff. Count Two alleges that defendant's wrongful misappropriation of plaintiff's funds was a substantial factor contributing to plaintiff's filing his voluntary petition in bankruptcy and that as a result plaintiff has suffered harm to his character and reputation, has sustained substantial cost and expenses, and has suffered severe emotional distress.

Where, as here, the parties have presented matters outside the pleading, a motion to dismiss for failure to state a claim upon which relief can be granted will be treated as a motion for summary judgment. Fed.r.Civ. P. 12(b). Therefore, in addition to taking all of plaintiff's allegations as true and drawing all inferences favorable to him, the Court will grant summary judgement

for defendant only where no genuine issue of material fact exists. Mortensen v. First Federal Savings & Loan Ass'n., 549 F.2d 884 (3d Cir. 1977).

N.J.S.A. 3B:17-8 provides:

> A judgement allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of all matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those in privity with or represented by interested parties except:
>
> a. For the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;
> b. Insofar as exceptions to the account shall be taken and sustained; and
> c. As relief may be had from a judgment in any civil action.
> [emphasis added]

Plaintiff contends that this statute applies to an administrator's final account only and not to an intermediate account. However, the courts of New Jersey

have consistently held that since 1905 the statute has given conclusive effect to intermediate as well as final accounts. See Brauberger v. Sheridan, 7 N.J.Super. 576 (ch.Div. 1950); Van Buren v. Plainfield Trust Co., 130 N.J.Eq. 244 (ch. 1941); Melosh v. Melosh, 125 N.J.Eq. 486 (ch. 1939); City Bank Farmers Trust Co. v. McCarter, 111 N.J.Eq. 315 (ch. 1932); In re Slater's Estate, 88 N.J.Eq. 296 (Prerog. 1917). In re Ackerman's Estate, 23 N.J.Super 316 (App. Div. 1952), cited by plaintiff, offers no support for his position. In that case, an intermediate account was not a bar to subsequent proceedings because the administrator had made overpayments to certain distributees that constituted mistakes in the account. The statute in effect at the time made a specific exception to the rule of res judicata in cases where there was a mistake in the account.

Plaintiff further contends that the doctrine of res judicata should not apply in this case because the action is based on defendant's fraudulent conduct. However, the only type of fraud that will justify the opening of a judgment of account is fraud in the procurement of the judgment. Brown v. Fidelity Union Trust

Co., 126 N.J.Eq. 406 (Ch. 1939). In words particularly appropriate to the case at bar, the Court in Brown stated:

> Counsel for complainants argue that this motion should not be granted because such action might prevent any inquiry into the alleged fraudulent practices of the trustees, or one of them, resulting in the investments in illegal securities, and that an allegation of fraud is always a sufficient basis for such an inquiry. While there is no doubt of this court's inherent jurisdiction in all cases of fraud, it will nor retry issues already disposed of in the orphans court even though the transactions approved by the decree of that court may have been fraudulent, unless the decree itself which is sought to be bacated was the result of such fraud. The fraud which would justify the opening of the decrees in this case is not such fraud as has been alleged, and which alleged fraudulent acts have been approved by those decrees, but fraud in the procurement of the challenged decrees. . .. There is not even a suggestion that the decrees here involved were procured by fraud. The argument cannot avail the complainants. 126 N.J.Eq. at 443-44 [citations omitted].

N.J.Ct.Rule 4:87-7 provides that in an action for the settlement of an account, any interested person may serve upon the accountant written exceptions to any item in, or omission from, the account. Plaintiff, as both a beneficiary and an alleged creditor of the estate, was

an interested pwerson entitled to file exceptions to any of the accounts. See Dunham v. Marsh, 52 N.J.Eq. 831 (1895). As a creditor, plaintiff could have objected to the inclusion in the estate of monies allegedly misappropriated by the administrator. He could have excepted to the items in the Fourth Account that reflected the receipt and retention of those monies. He failed to do so despite the undisputed fact that he was served with all the papers necessary to apprise him of items in, or omissions from, the account and of the action to approve the account. Plaintiff alleges that he had no notice of possible wrongful conduct on the part of defendant until the bankruptcy proceedings. However, those proceedings took place in the fall of 1980, well before the Probate Court action for settlement of the Fourth Account in April 1981. Thus, at the time of the Probate Court action, plaintiff had ufficient notice of defendant's alleged wrongdoing to raise the objection that he has raised in this Court. Since no exceptions were filed, the judgment allowing the Fourth Account is re judicata as to those exceptions plaintiff could have taken, constitutes approval of the legality and propriety

of defendant's actions, and exonerates and discharges defendant from all claims of plaintiff.

Plaintiff argues that his rights against defendant have been preserved by the Bankruptcy Court's order of November 10, 1980 which states in relevant part:

> Any and all rights (if any) of the Debtor, Eugene E. Mori, for surcharge against the Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, are hereby preserved. Nothing contained herein shall be deemed either to negate or create the right of Debtor to bring an action against the Bank of New Jersey in its capacity as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, for surcharge or breach of fiduciary duty, or for any other appropriate cause of action at a future date in a proper forum. Nothing in this Order, furthermore, shall be deemed as a waiver of any of Debtor's rights (if any) against the Bank of New Jersey in its capacity as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, in assertion of a future claim by Debtor against the Bank of New Jersey, as Administrator aforesaid, for wrongful seizure of Debtors funds. Nothing inthis Order shall be deemed to prejudice the future assertion by Debtor against the Bank of New Jersey, as Administrator aforesaid, of other appropriate claims (if any) arising out of the Bank of New Jersey, as Administrator aforesaid, having withheld various funds from Debtor. [emphasis added]

The above provision of the Bankruptcy Court order has no effect on the present action. The order preserved plaintiff's rights to raise his claims in an action subsequent to the

bankruptcy proccedings. However, it did not create any new right in plaintiff to raise claims barred by the doctrine of res judicata. Nothing in the order prevented plaintiff from raising his claims against defendant in the Probate Court action for settlement of the Fourth Intermediate Account. Having failed to do so, plaintiff is barred from raising those claims in this action by the doctrine of res judicata.

I find that no genuine issue of material fact exists. Assuming that all of plaintiff's allegations are true, it is undisputed that plaintiff received notice of the Probate Court proceeding for the settlement of the Fourth Account, that he had notice of possible claims against defendant, that he could have raised those claims by way of exceptions to the accounting but failed to do so, and that final judgment approving the account was entered by the Probate Court.

For the foregoing reasons, defendant's motion is granted. See attached order.

FOOTNOTES

1. A successful tax appeal had been taken in which plaintiff and defendant were represented by Melvin Gittleman, Esq., another defendant in this case. The amount owed Gittlemen by plaintiff and whether he was liable to plaintiff for the wrongful misappropriation of some of the refund checks are also issues in the suit but have no direct bearing on the instant motion.

2. Upon the Court's request, defendant attempted to obtain copies of the cancelled tax refund checks from the Township of North Bergen but was advised that the checks were no longer available to the Township.

3. See note 1, supra.

4. Based upon the allegations of the complaint and statements contained in the affidavit submitted by defendant, it appears that Gittlemen retained certain of the refund checks by virtue of his assertion of a lien for these services.

5. The affidavit of services also notes that had defendant not advanced the payments for plaintiff, the tax appeal would have been dismissed.

6. Plaintiff is a citizen of Florida and defendants are citizens of New Jersey.

EUGENE EWAN MORI,

Plaintiff,

v.

THE BANK OF NEW JERSEY, etc., et al.,

Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 82-2447
(Hon. Clarkson S. Fisher)

REPORT AND RECOMMENDATION

PROCEDURAL HISTORY

This matter is before me on defendant Gittleman's application for reconsideration of my December 6, 1983, recommendation to Chief Judge Fisher in which I suggested a denial of Gittleman's motion for summary judgment.

In the fall of 1983, defendant Gittleman moved for summary judgment. Plaintiff, Mori, countered by moving for more specific answers to certain interrogatories.

While those motions were under advisement, counsel for the parties asked me to delay decision for a period of time in order to afford them time to pursue certain settlement discussions. I agreed to do so.

When the settlement discussions ultimately proved fruitless, I filed a December 6, 1983 Letter Opinion and Report and Recommendation in which I ordered more specific answers to certain of plaintiff's interrogatories. Since I felt it improper to consider a summary judgment in favor of a party who had not provided complete discovery, I recommended a denial of that motion without prejudice.

By letter of December 13, 1983, counsel for defendant Gittleman wrote to the court advising that the more specific answers to interrogatories had already been provided and requesting a reconsideration of the summary judgment motion.

Plaintiff's counsel replied by letter of December 16, 1983. He acknowledged having received more specific answers to the interrogatories and asked for 10 additional days to review them with his client. He also requested the opportunity to present oral argument on the issue of summary judgment if I decided to grant reconsideration.

I decided to grant reconsideration and advised all parties that oral argument would be heard on January 9, 1984. No additional written materials were submitted. Shortly before that date, Mr. Wasserstrum, plaintiff's counsel, telephoned my chambers to advise that his client wished to engage another attorney to represent him. No motion to be relieved as counsel was ever filed by Mr. Wasserstrum.

On January 9, 1984, counsel for defendant Gittleman appeared. Mr. Mori appeared without counsel. When I inquired about Mr. Mori's counsel, he stated that he did not have any. Accordingly, I afforded Mr. Mori the opportunity to offer any oral presentation he wished in order to supplement the legal brief and affidavits which had earlier been supplied by Mr. Wasserstrum.

For the reasons which follow, I respectfully recommend that Gittleman's motion be granted.

DISCUSSION

The entire factual and legal background of this case was discussed and examined in an extensive opinion filed by Chief Judge Fisher on March 16, 1983 (copy attached as Exhibit A to this Report). In that opinion, Chief Judge Fisher granted the motion for summary judgment which had been filed by co-defendant The Bank of New Jersey.

Plaintiff's complaint against defendant Gittleman centers on allegations that Gittleman wrongfully misappropriated certain sums of money. The main basis of Judge Fisher's earlier ruling in favor of New Jersey National Bank was holding that the doctrine of res judicata barred any suits against the Bank, since plaintiff had been a party to the administration proceedings regarding his father's estate and failed to object to the Bank's actions in that proceeding.

Arguing that the sums plaintiff claims were wrongfully misappropriated were part of the sums adjudicated to be proper in the administration

proceedings, Gittleman maintains that res judicata principles entitle him to summary judgment. I agree.

The Affidavit of Melvin Gittleman submitted in support of the within motion and the Affidavit of Vincent J. Gentile filed in support of the earlier Bank of New Jersey's motion establish the following fact:

On or about June 19, 1974, Mr. Gittleman was retained by the plaintiff to represent his interest and the interests of his father concerning real estate tax appeals for numerous parcels of property in the Township of North Bergen of New Jersey. The retainer agreement entered into between the parties is annexed to Mr. Gittleman's Affidavit as Exhibit A. At this time, plaintiff owned an undivided 25 percent interest in the subject properties and his father, who approved of Mr. Gittleman's representation, owned an undivided 75 percent interest therein.

Pursuant to the retainer agreement, Mr. Gittleman proceeded to file appeals from real estate tax assessments for the various properties. As a result of Mr. Gittleman's efforts, substantial reductions in real estate tax assessments for the subject properties were obtained. Moreover, during the course of Mr. Gittleman's investigation of plaintiff's properties, he discovered that taxes were being paid on numerous parcels which the Moris had not owned for many years. Mr. Gittleman was thus able to obtain substantial refunds for these properties, as well. Through Mr. Gittleman's efforts, tax reductions were obtained for years 1974, 1975, 1976, 1977, 1978, 1979 and 1980. Through the 1978 tax year, Mr. Gittleman had obtained assessment reductions for the subject properties in excess of $3 million and tax saving of almost $500,000.00. (See Exhibit H to Mr. Gittleman's Affidavit).

The plaintiff's father died on October 8, 1975. On October 23, 1975, the Superior Court of New Jersey, Chancery Division, Burlington County, Probate Division, issued Letters of Administration Pendente Lite on the father's estate to the Bank of New Jersey. The Court's Order is annexed to Mr. Gittleman's Affidavit as Exhibt B.

Soon after the Bank of New Jersey was appointed Administrator, extensive negotiations and discussions took place between representatives of the Bank and Mr. Gittleman concerning Mr. Gittleman's Affidavit as Exhibit C. This agreement authorized Mr. Gittleman to proceed with the prosecution of the real estate tax appeals for all of the Moris' property in North Bergen. Mr. Gittleman's retainer agreement with the Bank of New Jersey provided that compensation for his legal services would be an amount equal to one-sixth of the actual tax savings obtained, plus out-of-pocket disbursements.

As was noted above, Mr. Gittleman proceeded to represent the Bank and plaintiff in the real estate tax appeals and obtained substantial savings. The Bank of New Jersey, as Administrator, filed an interim application to the Probate Court and, in connection therewith, on or about February 3, 1977, Mr. Gittleman prepared an Affidavit setting forth the sums then due him arising from pre-death services to the decedent. Mr. Gittleman's Affidavit, with accompanying Exhibits, is annexed to his Affidavit as Exhibit D. Mr. Gittleman's fees and expenses were approved by the Court without objection from plaintiff or anyone else.

In early 1977, the Bank of New Jersey instituted an action against plaintiff, and others, in the Superior Court of New Jersey, Chancery Division, Hudson County, based on the Bank's payment of real estate taxes on the Township of North Bergen for tax years 1974 through 1978. The Bank claimed that although the payment of these taxes

was the plaintiff's responsibility, he refused to pay. The Bank paid those sums in order to protect the interests of the estate and to preserve both parties' ability to file tax appeals for the property in question. The Bank sought recovery of those sums along with other amounts due and owing to the estate by the son and also sought to have the land in question partitioned so that the portion representing the estate's interest could be sold.

On November 18, 1977, The Hudson County Court issued a Consent Order partitioning the real property on the basis of 75 percent to the Estate and 25 percent to plaintiff.

Subsequently, on or about February 8, 1979, the Hudson County Court issued a Consent Order in favor of the Bank, as Administrator, and against the plaintiff in the amount of $1,480,000.00, plus interest. This sum included substantial amounts due to the Bank by the plaintiff for 25 percent of the real estate taxes the Bank had to pay during

the past several years.

On January 31, 1979, approximately 8 days prior to the entry of the aforementioned judgment, the plaintiff advised the Bank that he intended to sell his portion of the partitioned land within two weeks and would apply the proceeds of his sale to pay the amount of the judgment. The Bank relied upon the plaintiff's representations and agreed to wait until the sale before enforcing its judgment. When the plaintiff failed to pay as he had promised, the Bank caused a Writ of Execution to issue and a Sheriff's sale was scheduled for April 12, 1979. Based on further representations by the plaintiff to the Bank, the Sheriff's sale was adjourned for one week until April 19, 1979, the plaintiff applied for a temporary restraining order enjoining the Sheriff's sale, but such application was denied. At approximately 10:45 a.m. on that same day, the plaintiff filed a voluntary petition under Chapter XII of the Bankruptcy Act,

11 U.S.C. §§1, et seq., in the United States District Court for the District of New Jersey (Bankruptcy No. B-79-00895), and thereby obtained an automatic stay of the impending Sheriff's sale. The plaintiff's schedules submitted in connection with his bankruptcy proceeding listed assets in excess of $24,000,000.00 and liabilities of approximately $6,600,000.00.

Throughout the proceeding in the Probate matter, the plaintiff bitterly contested the sums being sought by the Bank and those whom the Bank had retained. The plaintiff was at all times a party to the proceedings in his father's estate and was at all times notified of, and in most cases present for, all such proceedings.

Between April 17, 1979 and May 21, 1979, the Bank, as Administrator, received tax refund checks for the real estate taxes paid by it on the subject property for the years 1974 through 1978 in the amount of $448,166.88. During this

five-week time period, Mr. Gittleman advised the Bank that he had retained tax refund checks from the Township in the amount of $31,968.83, by virtue of his assertion of a lien for legal services provided to the son, plaintiff herein, a portion of which had been earned many years earlier but had not been paid by plaintiff.

Prior to the receipt of these tax refund checks, and as a result of the bitter fight being waged by the plaintiff in the Probate proceedings, the Bank requested that Mr. Gittleman accept payment of three quarters of the amount due from the estate for Mr. Gittleman's legal services and seek the balance of one quarter from plaintiff. Mr. Gittleman agreed to this arrangement and this arrangement was explicitly set forth in the applications of the Administrator and, in particular, in the Affidavit of Vincent Gentile annexed to the application for a Third Accounting. The Order to Show Cause and Affidavit are annexed as Exhibits

E and F to Mr. Gittleman's Affidavit and the judgment on the Third Intermediate Account, which approved Mr. Gittleman's fee and made reference to the 75/25 percent split, is annexed to Mr. Gittleman's Affidavit as Exhibit I.

The sums approved by the Probate Court for Mr. Gittleman's fee, as reflected in Exhibit I, were based on the substantial and continual services performed by Mr. Gittleman on behalf of both the estate and plaintiff and were described in extensive detail in the Affidavit Mr. Gittleman presented to the Probate Court. A copy of this Affidavit is annexed to Mr. Gittleman's Affidavit in this matter as Exhibit H. This Affidavit reflects, among other things, that the total savings of the settlements in the tax appeal case was almost $500,000.00 through 1978. The estate's share (three quarters of that amount), was $364,825.53 and the plaintiff's share of such tax saving, through 1978, was therefore $121,608.05. Plaintiff's share of Mr. Gittleman's fees and expenses was $20,410.43.

Previously, the court had approved Mr. Gittleman's fees for pre-death services to the estate in the amount of $4,164.14. (See Exhibit G to Mr. Gittleman's Affidavit). Plaintiff's share of Gittleman's application for his fees and expenses was $1,388.04.

On June 27, 1979, the Probate Court entered its Order approving payment by the estate of three quarters of Mr. Gittleman's fees and disbursements, without reduction (Exhibit I). As is noted in Exhibit I, the fact that the Bank was paying three quarters of Mr. Gittleman's fee and plaintiff was responsible for one quarter is explicitly set forth in the Court's Order.

Moreover, immediately after the five-week period during which the Bank received its tax refund checks, the Bank (per Mr. Gentile) wrote a letter, dated June 5, 1979, to plaintiff advising him of the Bank's retention of certain funds received from the tax refund and also advising of the retention by Mr. Gittleman of the $31,968.83

which is the subject of this lawsuit. That letter is annexed to Mr. Gittleman's Affidavit as Exhibit O. The plaintiff never advised either the Bank or Mr. Gittleman, either orally or in writing, of any objection to the actions which were described in that June 5, 1979 letter. Thus, although the plaintiff was represented by counsel through the Probate proceeding and was served with copies of all of the pleadings and other papers filed by the Bank in that matter, the plaintiff never served or filed written exceptions to any item in or omission from the Third Intermediate Accounting reflecting Mr. Gittleman's fees and never complained about the retention of approximately $31,000.00 by Mr. Gittleman for Mr. Gittleman's fees.

As was briefly noted above, the plaintiff filed for bankruptcy just prior to the scheduled Sheriff's sale of his property. Hearings were held in the bankruptcy proceedings between September 17, 1980 and November 10, 1980 with respect to confirmation of plans of arrangement under Chapter XII

of the Bankruptcy Act.

During these proceedings, the same actions which are being attacked in this lawsuit by plaintiff were litigated in that proceeding and all of the transactions giving rise to this lawsuit were examined in detail in the Bankruptcy Court. Plaintiff was present at the hearing and, at all times, was represented by his counsel in this matter, Seymour Wasserstrum, Esq. Plaintiff never listed as an asset on any schedules submitted to the Bankruptcy Court any cause of action he may have had against Mr. Gittleman.

At present, plaintiff continues to own the properties which formed a part of the tax appeals giving rise to this lawsuit. Nowithstanding the fact that settlements were agreed upon through tax year 1978, the old assessor for the Township of North Bergen reinstituted the assessments in every case on all of the Mori properties in North Bergen. The tax bills for the properties in question are annexed to Mr. Gittleman's Affidavit as Exhibit M. Mr. Gittleman informed plaintiff

of such fact and advised him that if he wished to continue the assessment at the settlement level, further appeals would be required. Mr. Gittleman contacted Mr. Mori by telephone and was authorized and directed by Mr. Mori to file appeals to protect his interests. Mr. Mori, however, was not able to designate the specific lots which he still owned and Mr. Gittleman therefore filed appeals for all of the lots in question, knowing that many of them had been given to the estate as part of the partition action.

Mr. Gittleman appeared before the Hudson County Board of Taxation in connection with these 1979 appeals and he was able to obtain a judgment for that year based on the settlement figures for 1978. This occurred notwithstanding the fact that Mr. Mori had, once again, failed to pay taxes for these properties and was thus legally barred from filing these appeals. (Mr. Mori did not have such luck with the Secaucus tax assessor. There, his failure to pay taxes deprived him of any right to

appeal.)

Plaintiff and Mr. Gittleman spoke about the tax appeal constantly and plaintiff not only knew, but expected Mr. Gittleman to appeal the assessments of the property then owned by him. Annexed to Mr. Gittleman's Affidavit as Exhibit P is a letter from plaintiff to Mr. Gittleman dated September 23, 1980. This letter refers to the amounts Mr. Gittleman received and was still owed by plaintiff, with no apparent objection thereto and with a further note confirming that Mr. Gittleman was authorized to continue to process the tax appeals for Mr. Mori on the properties he still owned. In his Affidavit, Mr. Gittleman computed the sums due him for all tax years in question as follows:

25 percent of total fee and expenses approved by Probate Court	$20,402.11
25 percent of pre-death services and disbursements approved by Probate Court*	$ 1,388.04
TOTAL APPROVED BY COURT	$21,790.15

* For services rendered on behalf of plaintiff in 1975, which plaintiff had never paid.

1979 savings (one-sixth of saving on one-forth of property at $3.84 tax rate)	$4,977.07	
1980 savings (one-sixth of saving on one-forth of property at $3.84 tax rate)	$4,977.07 (est.)	
TOTAL APPROVED BY PLAINTIFF		$ 9,954.14
GRAND TOTAL		$31,744.29

The actual 1980 tax rate of 4.868, as opposed to the estimated rate, results in a total fee of $33,055.53. The tax savings for 1981, the final year of the benefit of the 1979 appeals, at the North Bergen tax rate of 4.762 would be $6,172.64, rendering a total then due of $39,228.17. As discussed above, Mr. Gittleman retained the sum of $31,968.83. Mr. Gittleman further indicated in his Affidavit that if one examines the actual parcels of property owned by Mr. Mori, as opposed to an arbitrary 75/25 split, then the tax savings to Mr. Mori would be even greater since his property was actually worth more than the 75/25 split.

As is indicated by all of the documents filed by Mr. Gittleman and the Bank of New Jersey,

at all times during the pendency of the Probate proceedings and the Bankruptcy proceedings, the plaintiff was aware of all of the facts which are now the subject of this lawsuit. At no time during any of these proceedings did he assert any claim, nor was Mr. Gittleman notified by plaintiff of any claim against him or the assertion of any entitlement to any funds in any of such proceedings.

Defendant Gittleman's fees, at least to the extent of the Court's orders in the New Jersey probate action. The court approved Mr. Gittleman's fees of $60,804.32 and expenses of $402 and apportioned 75% of that amount as the Bank of New Jersey's share and 25% as plaintiff's. Thus, it is clear that plaintiff was placed on notice of the amount of Mr. Gittleman's fees in the probate proceeding. Indeed, this Court has already held, in ruling on The Bank of New Jersey's motion, that the probate order has res judicata effect. In short, by his silence, plaintiff assented to the reasonableness of Mr. Gittleman's fees, which were set-

tled in the probate matter. Plaintiff, therefore, cannot now dispute the $21,790.15 covered by the intermediate probate accountings.

As for the remaining $9,954.14 which Mr. Gittleman retained for the tax years 1979 and 1980 (2 years after the probate court's approvals), plaintiff is in no better legal position.

Mr. Gittleman's Affidavit establishes that after the probate proceedings concluded, plaintiff not only knew of Mr. Gittleman's continued actions in the tax appeals, but confirmed that Mr. Gittleman, as his attorney, would appeal the erroneous assessments made by the Township of North Bergen. Plaintiff's letter to Mr. Gittleman dated September 23, 1980 and annexed to Mr. Gittleman's Affidavit as Exhibit P, states:

> Also, as we have discussed, I feel the assessments and taxed on North Bergen block ....are excessive. You advised me that you would file appeals on these.

Mr. Gittleman, in fact, filed appeals for those years, obtained substantial reductions, and when he received the drafts from North Bergen, he

retained the approximate sums saved for 1979 and 1980. The percentage charged by Mr. Gittleman, one-sixth of the savings, had previously been approved by the probate court as reasonable.

Most importantly, plaintiff confirmed his arrangements with Mr. Gittleman for years beyond the probate proceedings more than a year after being advised that Mr. Gittleman was retaining these funds for these very years--1979-1980.

Mr. Gittleman did exactly what was asked of him--he filed tax appeals for plaintiff's properties--and the fee he retained was based exclusively on the arrangement plaintiff had agreed to during the probate proceeding and which had been approved as reasonable by the probate court. Plaintiff later confirmed Mr. Gittleman's retention in writing more than one year after being told of Mr. Gittleman's retention of the funds. As a result of plaintiff's acts, or failure to act, in face of all of the information known to him, he was waived and is estopped from asserting any claims against Mr. Gittleman whether for sums approved or not ap-

proved by the probate court.

Plaintiff, by his conduct, led Mr. Gittleman to believe that he approved Mr. Gittleman's acts in preserving plaintiff's tax appeals for 1979 and 1980. Indeed, if Mr. Gittleman did not file and prosecute the tax appeals, plaintiff's right to tax savings in excess of $50,000.00 would have been irretrievably lost. Mr. Gittleman acted in reliance on plaintiff's statements and conduct to prosecute the appeals and plaintiff cannot be heard now to disavow his acts. Plaintiff is estopped from attacking Mr. Gittleman's actions. See, e.g. In re Gravure Paper and Board Corp., 234 F.2d 928 (3d Cir. 1956); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 403 A.2d 880 (1979). To permit plaintiff now to attack Mr. Gittleman's acts of preserving plaintiff's rights and obtaining tax reductions for plaintiff would be unconscionable and inequitable and plaintiff must therefore be barred from raising any claims against Mr. Gittleman. See, e.g., State by Parsons v. U.S. Steel Corp., 22 N.J. 341, 126 A.2d 168 (1956).

Furthermore, plaintiff's acts of continuing to retain Mr. Gittleman after knowing of Mr. Gittleman's retention of the sums set forth in the Bank's letter to plaintiff constitute a waiver of any claims plaintiff may have against Mr. Gittleman. When plaintiff advised Mr. Gittleman that he expected Mr. Gittleman to continue to prosecute the appeals for 1979 and 1980, he unquestionably led Mr. Gittleman to believe that (1) he had no problem with Mr. Gittleman's past acts; and (2) he would compensate Mr. Gittleman in the same manner as then existed and as had been approved by the probate court. Plaintiff thus waived all claims which he may have had against Mr. Gittleman. See, e.g., Mayer v. Development Corp. of America, 541 F.Supp. 828 (D.N.J. 1981); West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 141 A.2d 782 (1958).

There is an additional reason why plaintiff's claim against defendant Gittleman must fail. Plaintiff did not list his right to this action among his assets during his bankruptcy proceedings.

A bankrupt must file with the court a schedule of all of his property. Bankruptcy Rule 108(a). Further, the bankrupt is under a continuous duty to disclose any new interests arising or acquired within six months after bankruptcy, Rule 108(e). Such supplemental schedules must be filed within ten days of the bankrupt's discovering the information. Id. A cause of action is an asset of the bankrupt estate; as such, it must be disclosed. See, First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408 (1905); Hanover Ins. Co. v. Tyco Industries, Inc., 500 F.2d 654 (3d Cir. 1974); Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982).

During two years of bankruptcy proceedings, plaintiff never once disclosed to the bankruptcy court that he had a claim against Mr. Gittleman. Plaintiff filed his petition April 19, 1979 and his schedule of assets May 14. On June 5, Vincent Gentile wrote to advise plaintiff of Mr. Gittleman's retention of his fee. Yet plaintiff never informed the court that the estate might now

have a cause of action against Mr. Gittleman, notwithstanding that the court twice that summer ordered plaintiff to submit revised schedules. Nor did plaintiff so advise the court at any other time through and including when the court ordered the implementation of a final settlement on May 15, 1981. Now, in this action, plaintiff seeks to assert this claim for the first time. If plaintiff ever possessed a valid cause of action, he has lost it by concealing it during bankruptcy.

The Supreme Court first considered this issue in First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408 (1905). In that case, the Court refused to allow a discharged debtor to assert a claim he had kept secret from the trustee in bankruptcy and the creditors:

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any

> action in respect to it. If the claim was of value ... it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

Id. at 119, 25 S.Ct. at 208.

"Courts, invoking Lasater, generally have not permitted parties asserting title to unlisted causes of action to enforce the claim, because they cannot demonstrate abandonment by the trustee." Stein, 691 F.2d at 891. See, Management Investors v. United Mine Workers of America, 610 F.2d 384, 392 (6th Cir. 1979), Moore v. Slonim, 426 F.Supp. 524 (D.Conn. 1977), aff'd mem., 562 F.2d 38 (2d Cir. 1977). Once a debtor enters bankruptcy, title to his causes of action vests in the trustee, who has the exclusive right to bring a cause of action to aggregate the assets of the estate. Hanover, 500 F.2d 654. Although a bankrupt may bring an action in his own right if the trustee has abandoned it, "when the bankrupt fails to list an asset,

he cannot claim abandonment because the trustee has had no opportunity to pursue the claim." Stein, 691 F.2d at 891.

Here, no trustee was appointed for plaintiff's estate. Instead, the bankruptcy court allowed plaintiff the status of debtor in possession. However, the legal principles are the same as if a trustee had been appointed. The Ninth Circuit decided this very question in November 1982 in Stein, supra. The court's opinion is illuminating:

> The debtor in possession is a fiduciary and owes the same duties as a trustee. Gochenour v. Cleveland Terminals Bldg. Co., 118 F.2d 89, 93 (6th Cir. 1941). The debtor in possession is strictly supervised by the bankruptcy court, and his actions, including abandonment, must be approved. The bankrupt does not act in his own interests until he reverts to his former status upon discharge and confirmation of the plan. The extent of the fiduciary duties should not vary with the identity of the one who performs that role.
>
> The dangers resulting from the concealment of assets are greater when the debtor remains in possession than in cases in

> which a third party acts as trustee. An outside trustee is a separate merchanism for discovering unlisted claims or assets. If a debtor in possession were permitted to omit claims in bankruptcy and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests. Such a rule would undermine the fiduciary status of the debtor in possession. Whether or not the failure to list the asset in the case before us was intentional, the opportunity for concealment must be considered in formulating the proper general rule.

691 F.2d at 892.

It is significant that the final order of the bankruptcy court does not list a claim against Mr. Gittleman as one that was preserved to the plaintiff. In contrast, the plaintiff's claim against the Bank of New Jersey, to the extent he had such a claim, was specifically referred to in the bankruptcy court's final order.

But not listing a cause of action against Gittleman among his assets in bankruptcy, plaintiff has lost his right to bring this suit.

I am well aware of the fact that summary judgment is a severe remedy, not to be granted where there is the slightest doubt about any material fact or about movant's right to relief as a matter of law. I have evaluated all of the written materials and oral presentations in the light of that exacting standard and nonetheless conclude that Mr. Gittleman's motion is meritorious.

If the Court agrees, I have attached an appropriate form of order. The granting of summary judgment to defendant Gittleman will leave only the Gittleman counterclaim remaining for trial in this action.

Respectfully submitted,

Dated: June 27, 1984

G. Donald Haneke
United States Magistrate

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5589

EUGENE EWAN MORI,
Appellant

v.

THE BANK OF NEW JERSEY
as Administrator Pendente Lite
of the Estate of Eugene Mori,
Deceased, and MELVIN GITTLEMAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 82-2447)
District Judge: Hon. Clarkson S. Fisher

Submitted Under Third Circuit Rule 12(6)
January 29, 1985
Before: GIBBONS, SLOVITER and VAN DUSEN, Circuit Judges

(Opinion Filed: Jan. 29, 1985)

MEMORANDUM OPINION OF THE COURT

John J. Gibbons
GIBBONS, Circuit Judge:

Eugene Ewan Mori appeals from a summary judgment in favor of defendant Melvin Gittleman, an attorney who represented Mori and his father with reference to real estate tax appeals in North Bergen, New Jersey.[1] Mori contends Gittleman charged excessive fees, and wrongfully misappropriated the proceeds of tax refunds owed to Mori as a lien for legal services provided to him. The district court granted summary judgment on the basis of a United States Magistrate's recommendation that the present action is bared by res judicata and defensive collateral estoppel. United Rental Equip. Co. v. Aetna Life & Cas. Ins. Co., 74 N.J. 92, 376A.2d 1183 (1977); Continental Can Co. v. Hudson Foam Latex Products, 129 N.J. Super. 426, 324 A.2d 60 (App. Div. 1974). A judgment by a probate court allowing an account is res judicata as to all exceptions which could or might have been taken into account. N.J. Stat. Ann. S 3B:17-8 (West 1983). Thus the account determined the reasonableness of fees charged by Gittleman, and that determination binds Mori, a beneficiary who made no exception to it.

Since the reasonableness of the fees was determined in the probate action and Mori is bound by that determination, the court did not err in granting summary judgment.

---

1. Summary judgment was entered in favor of the remaining defendants on March 17, 1983. Thus the order appealed from disposes of all claims against all parties. Fed. R. Civ. P. 54(b).

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

John J. Gibbons
Circuit Judge

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NEW JERSEY

EUGENE EWAN MORI,

Plaintiff,

vs.

THE BANK OF NEW JERSEY AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE OF EUGENE MORI, DECEASED and MELVIN GITTLEMAN,

Defendants.

CIVIL ACTION NO. 82-2447W

ORDER FOR SUMMARY JUDGMENT

This matter having been opened to the Court by Kalb, Friedman and Siegelbaum, attorneys for defendant Melvin Gittleman, in the presence of plaintiff, Eugene Ewan Mori, by his counsel, Seymour Wasserstrum, Esq., for an Order granting defendant summary judgment dismissing the complaint with prejudice pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the moving papers and argument of counsel, and the Court being of the opinion that the complaint should be dismissed;

It is on this 10th day of July, 1984

ORDERED, that judgment be and hereby is granted in favor of defendant Melvin Gittleman and against plaintiff Eugene Ewan Mori dismissing the complaint against said defendant with prejudice.

CLARKSON S. FISHER,
CHIEF JUDGE, U.S.D.C.

Mr. Eugene E. Mori

Spring Lake Club Apartments

5400 N.W. 159th Street

Miami, Florida 33014

Attorney Pro Se

EUGENE EWAN MORI,

Plaintiff

vs.

THE BANK OF N.J. AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE OF EUGENE MORI, DECEASED, and MELVIN GITTLEMAN,

Defendants.

U.S. DISTRICT COURT FOR THE DISTRICT OF N.J.

HONORABLE CLARKSON S. FISHER

Civil Action # 82-2447-W

NOTICE OF APPEAL TO A CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

NOTICE IS HEREBY GIVEN that EUGENE EWAN MORI, above named plaintiff, hereby appeals to the United States Court of Appeals for the Third Circuit, from the Order for Summary Judgment entered in this action on July 10, 1984, by Honorable Clarkson S. Fisher, U.S.D.C.. whereby Judge Fisher granted Summary Judgment in favor of defendant MELVIN GITTLEMAN.

Dated: August 7, 1984

EUGENE E. MORI
Attorney Pro Se

Office - Supreme Court, U.S.
FILED
MAY 29 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1697

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

o

Eugene Ewan Mori

Petitioner,

v.

Melvin Gittleman

Respondent.

o

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

o

BRIEF IN OPPOSITION

o

MARC S. FRIEDMAN
Kalb, Friedman and
Siegelbaum
Counsel for Respondent
Melvin Gittleman
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Roseland, NJ 07068
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On the Brief:
STEVEN D. FLEISSIG
MERLE MILDER

BEST AVAILABLE COPY

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STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals for the Third Circuit err as a matter of law in upholding the decision of the District Court for the District of New Jersey to dismiss the Complaint against defendant Melvin Gittleman on the basis of res judicata and collateral estoppel?

STATEMENT OF THE CASE

Petitioner filed a complaint in this matter on July 30, 1982, naming as defendants Melvin Gittleman and the Bank of New Jersey as Administrator of the Estate of Eugene Mori, deceased, the Petitioner's father. (the "Bank" or the "Administrator"). Count One of the complaint alleged that the defendants wrongfully misappropriated drafts they received from the Township of North Bergen which were actually payable to Petitioner. Count Two of the complaint alleged that Mr. Gittleman's wrongful misappropriation of Petitioner's funds was a substantial factor contributing to Petitioner's filing of his voluntary petition in bankruptcy and resulted in other harm to Petitioner.

The United States District Court for the District of New Jersey, per the Honorable Clarkson S. Fisher, Chief Judge, dismissed the complaint as against

the Bank on March 16, 1983. App. 1a (References are to Petitioner's Appendix.) The Court held that since Petitioner, a party to the administration proceedings regarding his father's estate, failed to object to the Bank's accountings in those proceedings, he was barred by the doctrine of res judicata from bringing his action against the Bank. Petitioner has not appealed that order.

Mr. Gittleman moved for summary judgment on June 17, 1983, because the sums Petitioner claims were wrongfully misappropriated were part of the sums adjudicated to be proper in the Bank's accountings. United States Magistrate Haneke issued his Report and Recommendation on June 27, 1984. App. 14a. The District Court, per the Honorable Clarkson S. Fisher, adopted the Magistrate's report and granted summary judgment in Mr. Gittleman's favor on July 10, 1984. App. 47a.

Petitioner appealed that order. On January 29, 1985, the United States Court of Appeals for the Third Circuit upheld the District Court's grant of summary judgment. App. 44a.

The petition for writ of certiorari followed.

STATEMENT OF FACTS

On or about June 19, 1974, Petitioner retained Mr. Gittleman to prosecute tax appeals for numerous parcels of property in the Township of North Bergen, New Jersey in which Petitioner owned a 25 percent interest and his father owned a 75 percent interest. Mr. Gittleman not only achieved substantial reductions in the real estate tax assessment for these parcels, but he also discovered that the Moris were paying taxes on numerous parcels which they had not owned for years and was able to obtain large refunds for these properties, as well. For the years 1974 through 1978, Mr.

Gittleman obtained assessment reductions in excess of $3 million and tax savings of almost $500,000.00 for the Moris. Additionally, he obtained tax reductions for 1979 and 1980.

Petitioner's father died on October 8, 1975. The Bank was named Administrator of his estate. As Administrator, the Bank authorized Mr. Gittleman to continue with his prosecution of tax appeals for all of the Moris' property in North Bergen, in return for which Mr. Gittleman was to be compensated in an amount equal to one-sixth of the tax savings obtained, plus out-of-pocket disbursements.

On November 18, 1977, the Hudson County Court issued a Consent Order partitioning the real property on the basis of 75 percent to the estate of Petitioner's father and 25 percent to Petitioner.

The Probate Court approved the Bank's interim accounting on February 28, 1978.

As part of this accounting, the Court approved Mr. Gittleman's application for fees incurred before the death of Petitioner's father in the amount of $4,164.14. Petitioner's share of these fees was $1,388.04.

On June 27, 1979, the Probate Court entered an Order approving, as part of the Bank's Third Intermediate Accounting, the Bank's payment of 75 percent of Mr. Gittleman's fee for tax appeals for the years 1975 through 1978. The Court explicitly stated that Petitioner was responsible for the remaining 25 percent of Mr. Gittleman's fee, or $20,402.11.

Petitioner never objected to Mr. Gittleman's fees when the matter was before the Probate Court, either with regard to the interim accounting or the Third Intermediate Accounting.

Although tax settlements were agreed upon through tax year 1978, the assessor for the Township of North Bergen

reinstituted the old assessments on all of the Mori properties in North Bergen. Petitioner authorized Mr. Gittleman to prosecute appeals for the years 1979 and 1980. The two spoke about the appeals constantly and Petitioner sent Mr. Gittleman a letter authorizing further legal action. Mr. Gittleman achieved a substantial reduction of taxes for these years, resulting in a further fee owed him by Petitioner of at least $9,954.14.

The total fees owed by Petitioner to Mr. Gittleman in 1979 amounted to more than $31,744.29. Petitioner was advised that Mr. Gittleman was withholding about that sum from North Bergen tax refunds not only by all the court papers relating to the Third Intermediate Accounting, every one of which was served on Petitioner, but also by a 1979 letter to Petitioner from Vincent J. Gentile of the Bank. Petitioner never complained to a court about the retention of those fees

until the institution of this suit in 1982.

Meanwhile, the Bank, as Administrator, obtained a judgment against Petitioner on February 8, 1979 in the amount of $1,480,000.00 plus interest. This sum included substantial amounts due to the Bank by Petitioner for his 25 percent share of the real estate taxes the Bank had to pay during the previous several years to protect the Estate's interest in the Mori properties.

Petitioner managed to obtain two postponements of the enforcement of the judgment by representing, among other things, that he intended to sell his portion of the property. Finally, on April 19, 1979, Petitioner's application for a temporary restraining order enjoining a sheriff's sale scheduled for 2:00 p.m. that afternoon was denied. At 10:45 a.m. that same day, Petitioner filed a voluntary petition under Chapter

XII of the Bankruptcy Act, 11 U.S.C. §§1 et seq., in the United States District Court for the District of New Jersey (Bankruptcy No. B-79-00895), and thereby obtained an automatic stay of the impending sheriff's sale.

The Petitioner's schedules submitted in connection with his bankruptcy proceeding listed liabilities of approximately $6,600,000.00 and assets in excess of $24,000,000.00. Petitioner never listed a claim against Mr. Gittleman as an asset, either in his initial schedules or in any of his supplemental schedules.

SUMMARY OF ARGUMENT

Petitioner is barred by the doctrines of res judicata and collateral estoppel from relitigating that portion of Mr. Gittleman's fees which was approved by the Probate Court, namely $21,877.47. He is barred by the doctrines of waiver and collateral estoppel from objecting to the balance of Mr. Gittleman's fees, or $9,954.14, because he authorized Mr. Gittleman to continue representing him for two years after the Probate Court's decision. Furthermore, Petitioner is barred from asserting the entire claim against Mr. Gittleman because he failed to list it as an asset during his bankruptcy proceedings.

ARGUMENT
I.

PETITIONER'S CLAIMS AGAINST MR. GITTLEMAN ARE BARRED BY THE DOCTRINE OF RES JUDICATA

Petitioner's claim, at least to the extent of $21,877.47, is barred by the doctrine of res judicata. This is the amount of fees Petitioner owed Mr. Gittleman which the Probate Court approved during the intermediate accountings. These accountings are conclusive on all issues raised or which might have been raised before that court. Petitioner had the opportunity and the standing to object to Mr. Gittleman's fee then, but he did not do so. He cannot now relitigate the question.

N.J.S. 3B:17-8 reads:

> A judgment allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken

> to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of other matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those in privity with or represented by interested parties except:
>
> a) for the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;
> b) insofar as exceptions to the account shall be taken and sustained; and
> c) as relief may be had from a judgment in any civil action. [emphasis added]

An intermediate accounting has just as conclusive an effect on the issues it decides as a final accounting. See Brauberger v. Sheridan, 7 N.J. Super. 576 (Ch. Div. 1950, Van Buren v. Plainfield Trust Co., 130 N.J. Eq. 244 (Ch. 1941),

Melosh v. Melosh, 125 N.J. Eq. 486 (Ch. 1939), City Bank Farmers Trust Co. v. McCarter, 111 N.J. Eq. 315 (Ch. 1932), In re Slater's Estate, 88 N.J. Eq. 296 (Prerog. 1917).

In the accounting of February 27, 1978, the court approved, without reduction, Mr. Gittleman's fees for services rendered before the death of Petitioner's father. The court ordered the Petitioner's father's estate to pay 75 percent of these fees, or $4,164.14, and noted that Petitioner owed the other 25 percent or $1,388.04.

In the Third and Intermediate Accounting of the estate on June 27, 1979, the court approved without reduction Mr. Gittleman's fees and expenses for services rendered after the death of Petitioner's father. The court ordered the estate to pay 75 percent of the fees, or $60,804.32, and 75 percent of the expenses, or $402.00. Again, the

court noted that 25 percent of the costs were chargeable to Petitioner. Plaintiff's share amounted to $20,268.11 in fees and $134.00 in costs, for a total of $20,402.11.

Petitioner had ample opportunity to object to Mr. Gittleman's fees before the court. In any action for the settlement of an account, an interested person may serve upon the accountant written exceptions to any item in, or omission from, the account. N.J. Ct. R. 4:87-7. Petitioner was clearly an interested person, as he was a beneficiary of the estate and, in that suit, he claimed to be a creditor of the estate. Hence, Petitioner was entitled to file exceptions. See Dunham v. Marsh, 52 N.J. Eq. 831 (E. & A. 1895), Poulson v. National Bank of Frenchtown, 33 N.J. Eq. 250 (Prerog. 1880). However, Petitioner did not do so, although he does not deny being served with all relevant court

papers which informed him of Gittleman's retention of his fee. Nor did Petitioner file objections to the Fourth and Intermediate Accounting of March 20, 1981, which restated the set-off of Petitioner's tax refund against his debts.

In addition to all of the court papers Petitioner received, Petitioner also received a letter dated June 5, 1979, from Vincent Gentile of the Bank of New Jersey, expressly setting forth the fees retained by Mr. Gittleman. It was incumbent upon plaintiff to file exceptions in court to retain his objections to the fees. Since he failed to do so, he lost his right to assert them.

Once the court approved an accounting, its judgment is final on all items contained therein. The court in City Bank stated that intermediate decrees "are conclusive on all questions

which were raised or which might have been raised and upon all parties to the accounting proceedings, or represented therein." 111 N.J. Eq. at 317. In Brown v. Fidelity Union Trust Co., the court held an accounting conclusive "against all the world, including creditors, legatees, and other beneficiaries." In holding an intermediate accounting final, the court in Van Buren stated that "it is fundamental law that that account cannot be inquired into collaterally in another court." 130 N.J. Eq. at 247.

By his silence, Petitioner assented to the reasonableness of Mr. Gittleman's fees, and the probate court settled the reasonableness conclusively. Petitioner cannot now dispute the $21,790.15 covered by the intermediate accountings. The decision below was correct and a writ of certiorari should not be granted.

II.

THE COURT'S EARLIER JUDGMENT DISMISSING THE COMPLAINT AGAINST THE BANK OF NEW JERSEY COLLATERALLY BARRED ANY ACTION AGAINST DEFENDANT GITTLEMAN

Because of the res judicata effect of the Probate Court accountings, the Honorable Clarkson S. Fisher, in his March 16, 1983 Opinion, granted the Bank of New Jersey's motion seeking to have the complaint dismissed as against it. Petitioner filed no objections or exceptions in these proceedings. Judge Fisher's decision, with respect to Petitioner's claims against Mr. Gittleman, collaterally estops Petitioner from now asserting that the probate proceedings are not res judicata in this new action.

The Court relied on N.J.S. 3B:17-8, quoted above, and the pertinent cases in granting the Bank's motion. The Court noted (at App. 7a):

> "...the courts of New Jersey have consistently held that since 1905 the statute has given conclusive effect to intermediate as well as final accountings."

Mr. Gittleman's fees, at least to the extent of $20,410.43, were determined to be reasonable by virtue of the Court's order on the Bank's Third Intermediate Accounting in the probate action. Since the intermediate accountings of the probate court were adjudged in this action to bar Petitioner's causes of action against the Bank based on the doctrine of res judicata, the Petitioner was collaterally estopped from denying the res judicata impact of the intermediate accountings with respect to Mr. Gittleman's fees. Mr. Gittleman's fees were part of the intermediate accounting already held to be res judicata in this action. Petitioner, by virtue of the doctrine of collateral estoppel, is barred from attacking Mr. Gittleman's fees, at least with respect to the sum of $20,410.43.

The law of collateral estoppel is now well established. Collateral estoppel is that branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally, although not exclusively, between the same parties involving a different claim or cause of action. State v. Gonzalez, 75 N.J. 181, 186 (1977). Under the facts of this case, the Court should apply the doctrine of defensive collateral estoppel. In Blonder - Tongue v. University Foundation, 402 U.S. 313, 328-330, 28 L.Ed 2d 788, 91 S.Ct. 1434 (1971), Justice White, speaking for the United States Supreme Court, discussed the rationale for permitting the use of defensive collateral estoppel:

> Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded

> dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue. The question in these terms includes as part of the calculus the effect on judicial administration, but it also encompasses the concern exemplified by Bentham's reference to the gaming table in his attack on the principle of mutuality of estoppel. In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. . . Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure' [citation omitted].

Thus, the Supreme Court has abandoned the strict requirements of mutuality (which treated identity of parties as a strict prerequisite to giving conclusive effect to a prior judicial determination of a matter, see State v. Gonzalez, 75 N.J. at 1880), favoring estoppel of a

plaintiff who has previously litigated an issue from relitigating the same issue against a different defendant. That is exactly what Petitioner is attempting to do here.

The New Jersey courts have frequently permitted parties to subsequent litigations to assert collateral estoppel both offensively and defensively. See United Rental Equipment Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92 (1972); Continental Can Co. v. Hudson Foam Latex Products, 129 N.J. Super. 426 (App. Div. 1974); Desmond v. Kramer, 96 N.J. Super. (Union Cty. Ct. 1967).

The doctrine of "defensive" collateral estoppel was properly applied by the district court. Petitioner already had "one bite at the apple" in the Bank's motion to try to avoid the impact of res judicata on his action below. The Court

ruled that res judicata barred Petitioner's action. Petitioner nevertheless seeks to have this Court ignore the intermediate accounting with respect to his claims against Mr. Gittleman. He cannot do so.

The three requirements for collateral estoppel cited with approval by Justice Pashman in State v. Gonzalez, 75 N.J. 181, are satisfied in the present action. These factors will be discussed seriatam:

a) Identity of Issue: Petitioner contended in his opposition to the Bank's motion that the intermediate accountings did not have res judicata effect. His contention was rejected by the court. Therefore, the issue presented by the two defendant is identical.

b) Was the prior action on the merits? The foregoing discussion reveal in no uncertain terms that this very issue, the res judicata impact of the

intermediate accountings, was decided on the merits on the Bank's motion. It was fully and completely litigated and has not been appealed.

c) Identity of Parties: The party against whom the doctrine is asserted, Petitioner, was himself the party in the earlier litigation. No issues of privity even exist.

Therefore, it is clear beyond any question that Petitioner is barred from denying the res judicata impact of the intermediate accountings in the probate proceedings. The complaint, to the extent set forth above, was properly dismissed.

III.

PETITIONER'S CLAIMS WERE BARRED BY HIS FAILURE TO ASSERT SAID CLAIMS IN THE BANKRUPTCY PROCEEDING

Petitioner failed to list his right to this action among his assets during his bankruptcy proceedings. He was thus barred from now asserting such claim.

A bankrupt must file with the court a schedule of all of his property. Bankruptcy Rule 108(a). Further, the bankrupt is under a continuous duty to disclose any new interests arising or acquired within six months after bankruptcy. Rule 108(e). Such supplemental schedules must be filed within ten days of the bankrupt's discovering the information. Id. A cause of action is an asset of the bankrupt estate; as such, it must be disclosed. See First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49

L.Ed. 408 (1905), Hanover Ins. Co. v. Tyco Industries, Inc., 500 F.2d 654 (3d Cir. 1974), Stein v. United Artists Corp., 691 F.2d 885 (9th Cir. 1982).

During two years of bankruptcy proceedings, Petitioner never once disclosed to the bankruptcy court that he had a claim against Mr. Gittleman. Petitioner filed his petition April 19, 1979 and his schedule of assets May 14. On June 5, Vincent Gentile wrote to advise Petitioner of Mr. Gittleman's retention of his fee. Yet Petitioner never informed the court that the estate might now have a cause of action against Mr. Gittleman, notwithstanding that the court twice that summer ordered Petitioner to submit revised schedules. Nor did Petitioner so advise the court at any other time through and including when the court ordered the implementation of a final settlement on May 15, 1981. Now, in this action, Petitioner seeks to

assert this claim for the first time. If Petitioner ever possessed a valid cause of action, he has lost it by concealing it during bankruptcy.

The Supreme Court first considered this issue in First National Bank v. Lasater, 196 U.S. 115, 25 S.Ct. 206, 49 L.Ed. 408 (1905). In that case, the Court refused to allow a discharged debtor to assert a claim he had kept secret from the trustee in bankruptcy and the creditors:

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value...it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts and still assert title to the property.

Id. at 119, 25 S.Ct. at 208.

It is irrelevant that no trustee was appointed and Petitioner was named debtor in possession, as the Ninth Circuit explained in Stein:

> The debtor in possession is a fiduciary and owes the same duties as a trustee. Gochenour v. Cleveland Terminals Bldg. Co., 118 F.2d 89,93 (6th Cir. 1941). The debtor in possession is strictly supervised by the bankruptcy court, and his actions, including abandonment, must be approved. The bankrupt does not act in his own interests until he reverts to his former status upon discharge and confirmation of the plan. The extent of the fiduciary duties should not vary with the identity of the one who performs that role. The dangers resulting from the concealment of assets are greater when the debtor remains in possession than in cases in which a third party acts as trustee. An outside trustee is a separate merchanism for discovering unlisted claims or assets. If a debtor in possession were permitted to omit claims in bankruptcy and later assert title to them, there might be an inducement to do so, to the prejudice of creditors' interests. Such a rule would undermine the fiduciary status of the debtor in possession. Whether or not the failure to list the asset in the case before us was intentional, the opportunity for concealment must be considered in formulating the proper general rule.

691 F.2d at 892.

It is significant that the final order of the bankruptcy court does not list a claim against Mr. Gittleman as one that was preserved to the Petitioner. In contrast, the Petitioner's claim against the Bank of New Jersey, to the extent he had such a claim, was specifically referred to in the bankruptcy court's final order.

By not listing a cause of action against Gittleman among his assets in bankruptcy, Petitioner lost his right to bring this suit.

IV

PLAINTIFF WAIVED AND WAS ESTOPPED FROM ASSERTING ANY CLAIMS AGAINST MR. GITTLEMAN FOR ANY SUMS

By his conduct after the Probate Court's approval of the accountings, Petitioner has waived his right to object to the $9,954.14 Mr. Gittleman retained for tax years 1979 and 1980.

After the probate proceedings concluded, Petitioner not only knew of Mr. Gittleman's continued actions in the tax appeals, but confirmed that Mr. Gittleman, as his attorney, would appeal the erroneous assessments made by the Township of North Bergen. Mr. Gittleman filed appeals for 1979 and 1980, obtained substantial reductions, and when he received the drafts from North Bergen, he retained his fees from sums saved for 1979 and 1980. The percentage charged by Mr. Gittleman, one-sixth of the savings, had previously been approved by the probate court as reasonable.

Mr. Gittleman did exactly what was asked of him -- he filed tax appeals for Petitioner's properties -- and the fee he retained was based exclusively on the arrangement Petitioner had agreed to during the probate proceeding and which had been approved as reasonable by the probate court. Petitioner later confirmed Mr. Gittleman's retention in writing more than one year after being told of Mr. Gittleman's retention of the funds. As a result of plaintiff's acts, or failure to act, in face of all of the information known to him, he has waived and is estopped from asserting any claims against Mr. Gittleman, whether for sums approved or not approved by the probate court.

Petitioner, by his conduct, led Mr. Gittleman to believe that he approved Mr. Gittleman's acts in preserving Petitioner's tax appeals for 1979 and

1980. Indeed, if Mr. Gittleman did not file and prosecute the tax appeals, Petitioner's right to tax savings in excess of $50,000.00 would have been irretrievably lost. Mr. Gittleman acted in reliance on Petitioner's statements and conduct to prosecute the appeals and Petitioner cannot be heard now to disavow his acts. Petitioner is estopped from attacking Mr. Gittleman's actions. See, e.g., In re Gravure Paper and Board Corp., 234 F.2d 928 (3d Cir. 1956); Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 403 A.2d 880 (1979). To permit Petitioner now to attack Mr. Gittleman's acts of preserving Petitioner's rights and obtaining tax reductions for Petitioner would be unconscionable and inequitable and Petitioner must therefore be barred from raising any claims against Mr. Gittleman. See, e.g., State by Parsons v. U.S. Steel

Furthermore, Petitioner's acts of continuing to retain Mr. Gittleman after knowing of Mr. Gittleman's retention of the sums set forth in the Bank's letter to Petitioner constitute a waiver of any claims Petitioner may have against Mr. Gittleman. See, e.g., Mayer v. Development Corp. of America, 541 F. Supp. 828 (D.N.J. 1981); West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 141 A.2d 782 (1958).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

KALB, FRIEDMAN AND SIEGELBAUM

By: _____
MARC S. FRIEDMAN

Dated: May 24, 1985